Supreme Court, U.S.
FILED

97 682 OCT 15 1997

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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MARGARITA SERAPION,
Petitioner,
v.
MARTINEZ ODELL & CALABRIA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 15, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

78pp

QUESTION PRESENTED

The prohibition against employment discrimination set forth in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, protects "employees" from discrimination. The question presented is:

Whether an individual partner in a professional corporation or similar entity, which is duly organized under local law as a legal entity independent of its partners or shareholders, should be excluded from the definition of "employee" under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, and therefore deprived of any protection against discriminatory actions by the entity.

PARTIES

The following listed parties have an interest in the outcome of this case:

Margarita Serapión

(Petitioner)

Martínez Odell & Calabria

Fred H. Martínez and the conjugal partnership composed of Fred H. Martínez and Josefina Guzmán;

Lawrence Odell, the conjugal partnership composed of Lawrence Odell and Margaret Mejía;

José L. Calabria, the conjugal partnership composed of José L. Calabria and Nereida Seda,

(Respondents)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, which affirmed the decision of the United States District Court for the District of Puerto Rico granting summary judgment against the plaintiff, Margarita Serapión, and dismissing her claim of sex discrimination.

Review by this Court is warranted because the decision of the court of appeals is in conflict with decisions from other circuits, and involves important questions of law of widespread applicability.

OPINIONS BELOW

The opinion of the court of appeals is reported at 119 F.3d 982 (1st Cir. 1997) and reproduced in Appendix A at 1a-21a. The opinion of the district court

is reported at 942 F. Supp. 80 (D.P.R. 1996) and reproduced in the Appendix at 22a-41a.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1997. Petitioner is presenting this petition for certiorari within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, provides in pertinent part:

> Definitions
>
> (b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . .
>
> (f) The term 'employee' means an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

STATEMENT OF THE CASE

Petitioner Margarita Serapión is a female attorney and certified public accountant with a distinguished history of both public and private service in Puerto Rico. She is a 1982 honors graduate of the University of Puerto Rico School of Law, where she taught for several years as a full-time professor in accounting and taxes in the School of Business Administration. A certified public accountant since 1973, she is the author of a leading treatise and newsletter on tax law issues related to Puerto Rico and is a recognized authority in that area of the law. Attorney Serapión was one of the first women on the island to become a Certified Public Accountant, the first woman president of a professional association on the island, and the first woman appointed by the governor of Puerto Rico to be a member of the Board of Accountancy of the Commonwealth State Department. As an attorney and a certified public accountant, Ms. Serapión has worked in both government service and private practice, heading the tax department of a major accounting firm, and later becoming an Assistant Secretary of the Commonwealth Treasury Department.

The petitioner was employed at the law firm of Martínez Odell Calabria & Sierra from 1982 to 1992, with the exception of a two year period during which she served as Assistant Secretary of the Treasury. In 1990, after receiving several promotions, she was named to the position of "senior partner" in the firm. The four other senior partners (all male) gave her a 4% equity interest in the firm, to which she made no capital contribution whatsoever. Some time after her designation as a senior partner, Serapión assumed *pro rata* liability for the Firm's debts, losses and other obligations.[1]

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[1] Under the law of Puerto Rico, however, this liability is only subsidiary to the liability of the firm itself. In contrast to the common law partnership, the Civil Code "sociedad" *itself* responds for

At the time of the senior partner designation, atty. Serapión was not placed on an equal footing with the four male senior partners, each of whom received greater compensation, benefits, profit distribution units,[2] and equity than she did. Unlike the male senior partners, she did not head a department within the firm, and she reported directly to a more senior attorney. The four senior partners, however, promised atty. Serapión that she would be elevated to an equal full partnership in three years.

The attainment of full parity with the male senior partners, however, never came to pass. On the eve of that promised transition, three of the four male senior partners proposed a change in atty. Serapión's status, which would have had the effect of limiting her future compensation and threatening her job security. When petitioner refused to accept the proposed change, the three dissolved the firm and immediately formed a new entity, from which the petitioner was excluded.

The respondent law firm is engaged in the practice of law in interstate commerce, with offices in San Juan, Puerto Rico.[3] It is a "sociedad" [4] duly organized under

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the liabilities incurred by the entity. Individual partners can be held to respond *only* in the event that the partnership itself is unable to meet the obligation. *Asociacion de Propietarios de Villas de Playa I v. Santa Barbara Co.*, 112 D.P.R. 33, 43-50 (1982).

[2] These *"PDU's"* were part of a profit-sharing system, by which the Firm's profits were proportionally distributed to roughly one half of the thirty attorneys who worked for the entity (those with the designation "junior" or "senior" partner). All of these attorneys, including Serapión, also received salaries as employees, pursuant to the law of the Commonwealth of Puerto Rico.

[3] The present tense is used throughout this petition, although some of the facts may have changed in the years since the facts which gave rise to the original action.

[4] The Spanish word "sociedad" will be used throughout this petition, since the approximate translation, "partnership", represents a

the Civil Code provisions of the laws of the Commonwealth of Puerto Rico. As such, it is structurally similar to professional corporations (*"PC's"*) organized under the laws of the fifty states. Under the law of Puerto Rico, the *sociedad* is a recognized juridical entity which is entirely apart from its members, much in the same manner as a professional corporation in the fifty states is separate from its partner-shareholders. *Cf.* Article 27 of the Civil Code of Puerto Rico, 31 L.P.R.A. § 101 (a "sociedad" is a juridical "person", i.e. an entity separate and apart from its members. "Artificial persons" include not only "corporations", but also "associations, whether civil, commercial or industrial"). The firm has the legal ability, as a separate and independent entity, to acquire and possess property and to contract obligations. By law, the *sociedad* can survive the death of a partner. It can sue and be sued, and can be held directly liable in suits brought against the entity as such.

The "partners" of the *sociedad*, are treated as "employees" for every legal purpose in the Puerto Rican juridical system, including the tax structure. All individuals who work for the firm, whether they are attorneys, paralegals or clerical staff, have an employment relationship with the legally separate entity engaged in the provision of professional services, which is the *sociedad* itself. Like a professional corporation in the fifty states, the *sociedad* withholds income tax from all of its employees, including the partners (who receive salaries, as opposed to "draws" defined as an advance against profits), and is entitled to deduct from its gross income the salaries paid to its partners for services rendered to the entity as employees.[5] The *sociedad* also makes payments to the local

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concept which is juridically different in significant aspects. *See, Puerto Rico v. Russell*, 288 U.S. 476, 53 S.Ct. 447, 77 L.Ed. 903 (1933).

[5] By contrast, the economic remuneration paid to partners in traditional common law partnerships, is not subject to withholding

workers compensation and unemployment compensation systems for the benefit of the individuals designated as partners. In contrast to the traditional partnership in the fifty states, moreover, the Puerto Rico *sociedad* must pay income taxes as a separate entity as such.[6]

Aproximately one half of the firm's thirty lawyers are designated as either "junior partners" or "senior partners", despite the fact that the great majority of them, like the petitioner, have made no capital contribution to the firm. These attorneys comprise the "Board of Partners" which, on paper, has the ultimate responsibility for management and policy-making in the firm, although two Managing Partners run the day-to-day operations of the firm.[7] All "partners", be they "junior" or "senior', receive fixed salaries, based on performance, in addition to the PDU's mentioned above.

In the first eleven years of its existence, the firm had never had a female "senior partner". Margarita Serapión, whose productivity was critical to the firm's financial success, was the first woman to break through to that position, only to be dismissed from the *sociedad* just as she

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as salaries to "employees", 26 U.S.C. §§ 3121(d), 3306(i), 3401(c). Typically, partners in such entites pay their own self-employment taxes. 26 U.S.C. § 701.

[6] *Buscaglia v. Tribunal de Contribuciones*, 65 D.P.R. 361, 363 (1945) [(law firm is a "juridical person distinct from its partners" and therefore obligated to pay income tax as an entity (transaltion supplied)]. The income tax referred to herein is that of the Commonwealth of Puerto Rico since *bona fide* reisdents of Puerto Rico, as well as entities organized under the law of Puerto Rico, are generally not subject to federal income tax. 26 U.S.C. §§ 881-82, 933.

[7] The appeals court incorrectly stated that the Executive Committee, to which petitioner belonged, "was responsible for the Firm's day-to-day management." 119 F.3d at 984, App. p. 3a. The factual record demonstrated that the Managing Partners actually had that function.

was ending her three-year phase-in period to full parity with the male senior partners.

Petitioner filed a Title VII action in the United States District Court for the District of Puerto Rico, based on federal question jurisdiction, 28 U.S.C. § 1331. Supplemental jurisdiction was asserted over the claims and parties brought before the court pursuant to the law of Puerto Rico, based on 28 U.S.C. § 1367(a) and (b). In her complaint, the petitioner alleged that the firm discriminated against her on the basis of her gender and that she was terminated as a result of the sex discrimination by the *sociedad*. She also asserted that three of the male senior partners (Martínez, Odell and Calabria) never intended for her to achieve full parity and that their actions, taken on the eve of her promised transition to full senior partnership status, were based on their gender-based animosity and their refusal to have a woman share in any real power and equality in the *sociedad*.

The district court dismissed the action, concluding that petitioner, as a senior partner with a small proprietary interest in the law firm, was not a covered "employee" with respect to Title VII. This decision was affirmed by the United States Court of Appeals for the First Circuit.

The Proceedings Below

In the district court, the respondents filed two motions for summary judgment, asserting that the petitioner was not a covered employee pursuant to the Civil Rights Act of 1964. Their initial motion was denied by the Chief Judge of the district court, who indicated that fact and credibility questions prevented summary disposition. 942 F. Supp. at 80, App., p. 25a. Subsequently, however, the case was transferred to a second judge, as part of a redistribution of cases upon his being named to the court. The second judge stayed discovery pending resolution of the

respondents' second dispositive motion.[8] He then proceeded to dismiss the action, on the basis *inter alia* of lack of coverage under Title VII.[9]

The petitioner appealed all issues to the United States Court of Appeals for the First Circuit. In her brief and at oral argument, petitioner urged the court to adopt an "entity" approach with respect to the coverage issue, and to consider the form and structure of the *sociedad*, the entity with which she had an employment relationship, as decisive for the determination of her "employee" status. She asked the court to examine the differences between a "partnership" under the common law (regarded as a mere aggregate or a collection of individuals and not a separate entity)[10] and a *sociedad* under the civil law (regarded as an entity which is entirely separate and distinct from its partners).[11]

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[8] The court of appeals incorrectly stated that the second motion "relied on atlernative grounds", i.e. the coverage issue. 119 F.3d at 986, App., p. 7a. The truth is that both motions had relied on these grounds. Indeed, the petitioner had unsuccessfully argued the Law of the Case doctrine as an impediment to the second attempt at summary disposition, but the lower court simply failed to mention this in its decision.

[9] The district judge also found that the petitioner had failed to make out a *prima facie* case of gender discrimination. Although this issue was extensively briefed on appeal, the First Circuit did not resolve this issue, since it relied exclusively on the coverage issue. 119 F.3d at 991, n.9, App., p. 20a.

[10] Under the common law, a partnership is not recognized as a legal entity separate from its members, or as having rights and duties as a distinct unit. Pursuant to the Uniform Partnership Act (UPA), although a partnership is an employer, each and every one of its partners also takes on the role of employer. Partnership activities and the rights and duties growing out of them are viewed in the common law as those of the partners themselves, and not of the entity as such.

[11] This Court has previously recognized the distinction between partnerships organized under the common law and the "sociedad" organized under the civil law of Puerto Rico. *See, Puerto Rico*

Oral argument was heard by a panel of the United States Court of Appeals for the First Circuit on May 5, 1997 and centered exclusively on the coverage issue. At the conclusion of the argument, the panel ordered the parties to file supplemental briefs addressing the issue of the "Puerto Rico partnership law only", so as to place the court in a position to consider the separate entity argument raised by the petitioner. *Cf.*, Order of Court, May 5, 1997, App. p. 42a.

The decision of the panel, dated July 18, 1997, was based exclusively on the coverage issue, which it described as "a gray area in the emerging jurisprudence of Title VII", and an "unresolved issue which lies at the epicenter of this appeal." The court further noted that "attempting to delineate the circumstances in which a particular partner should be regarded as an employee for Title VII purposes is tricky business." 119 F.3d 982, at 982, 986, 987, App., pp. 1a, 7a, 9a.

In making its determination that the petitioner was bereft of Title VII coverage, however, the panel chose to ignore the very issue for which it had requested supplemental briefs. Mischaracterizing the nature of petitioner's argument (as positing that "the status of an individual under Title VII should vary depending on the law of the state in which a partnership entity is chartered or in

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v. Russell & Co., 288 U.S. 476, 53 S.Ct. 447, 77 L.Ed. 903 (1933), recognizing the distinct juridical personality of the "sociedad en comandita" organized under the law of Puerto Rico:

> The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships. *The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise. Therefore, to call a sociedad en comandita a limited partnership in the common law sense, as the respondents and others have done, is to invoke a false analogy.* In the law of its creation, the sociedad is consistently regarded as a juridical person. It may contract, own property, and transact business, sue and be sued in its own name and right. [Citations omitted; emphasis supplied].

which a claim arises"),[12] the panel rejected it and stated the obvious—that the coverage issue is "a matter of federal law, and the question must be answered with references to principles of federal law." 119 F.3d at 988, App., p. 11a. Nonetheless, the panel rejected petitioner's urging that it adopt an entity approach, which would have recognized that as a matter of federal law, the court could not ignore the nature of the entity chosen by the co-venturers. Rather, the panel simply ignored the difference between the Puerto Rican *sociedad* and the common law partnership, and by implication the analogous difference between a professional corporation and a partnership. Treating the *sociedad* as identical to a partnership, the panel determined that although Title VII might in some circumstances provide coverage for a person designated as a "partner" in a law firm, the petitioner was not entitled to such protection, by virtue of her ownership of a small minority interest in the firm, her subsidiary minority liability for firm debts, and her nominal participation in the firm's governing board.

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[12] Contrary to the panel's asseveration, the petitioner did *not* argue that the *federal* definition of "employee" should vary from state to state, depending on the particular contours of state law. Rather, she argued that a uniform federal approach should be taken. In those instances in which the employer is organized as a separate and independent legal entity, which pays salaries and employee benefits to the partner-shareholders, withholds tax from those salaries, on which it pays income tax, and whose employees are entitled to such benefits as unemployment insurance, workers compensation, etc., this should be determinative of an individual's status as an "employee". See, *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793 (2d Cir. 1986). Of necessity, this analysis requires the courts to examine both federal and state law, not as a *source* of rights pursuant to federal law, but rather as an aid in understanding the *nature of the business entity* involved and its relationship to particular individuals.

THE REASONS FOR GRANTING THE WRIT

I. THE ISSUE PRESENTED HAS WIDESPREAD EFFECT AND IS OF EXTRAORDINARY PUBLIC IMPORTANCE, IN LIGHT OF THE GROWING NUMBER OF INDIVIDUALS EMPLOYED BY BUSINESS ENTITIES ENGAGED IN THE PROVISION OF PROFESSIONAL SERVICES.

The First Circuit has decided an issue of enormous public importance. Today, over thirty years after the passage of Title VII, and a half a decade after the formation of the Glass Ceiling Commision, Pub. L. 102-166, Title VII, Nov. 21, 1991, 105 Stat. 1081, there still is no clear standard with respect to the widely contested issue of coverage under the act for those women and minority professionals employed in entities such as the Puerto Rico *sociedad* or the professional corporation in the fifty states.

Indeed, the result of much of the recent case law addressing the coverage issue is to effectively exclude from protection women and minority "partners" who make their first steps towards breaking the notorious glass ceiling, only to find themselves devoid of any effective protection against the discrimination they face once the ceiling experiences its first crack.

The reality in today's marketplace is that the bulk of professional employees work for the private sector, often in entities which are organized as separate and independent from the professionals themselves, and in which the job security and employment conditions of such individuals depend on structures outside of their control. The United States is home today to more than 1,000,000 operating "partnerships", with some 13,000,000 individual partners. *See*, UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 535 (116th ed. 1996). This number includes an ever-growing group of professional entities such as the one involved in the case at bar.

In the 1960's, the various states began to pass legislation authorizing the formation of professional corporations and similar associations. J. CRANE & A. BROMBERG, HANDBOOK ON THE LAW OF PARTNERSHIP 182 (1968). Currently, all states and the District of Columbia have statutes providing for professional corporations or associations. Philipps, McNider & Riley, *Origins of Tax Law; The History of the Professional Service Corporation*, 40 WASH. & LEE L. REV. 433, 439 (1983). Thus, a growing number of professionals find themselves in employment relationships with business concerns which, in both form and operation, depart significantly from the classic aggregate common law partnership. Such individuals relate to their employer, the professional corporation or in the case of Puerto Rico, the *sociedad*, in a manner which is virtually indistinguishable from the relationship of an "employee" to a corporation.

Those courts which have refused to recognize the fact that such organisms are separate and distinct from their partners fail to protect a large sector of the working population from the invidious discrimination the civil rights laws are designed to prevent. Importantly, the significance of the determination regarding employee status extends far beyond Title VII, which is only but one of several federal employment laws whose protection such individuals deserve. Other federal anti-discrimination statutes, such as the Age Discrimination in Employment Act ("*ADEA*"), 29 U.S.C. § 621 *et seq.*, the Equal Pay Act of 1963, 29 U.S.C. § 206(d), the Americans with Disabilities Act of 1990, ("*ADA*"), 42 U.S.C. § 12102 *et seq.*, and the Family and Medical Leave Act, 29 U.S.C. § 2611 *et seq.*, apply to "employees", with the term defined in a manner similar to the Title VII definition. Accordingly, the issue presented in this petition is of great importance in order to assure that Congressional anti-discrimination policies pursuant to a wide array of federal statutory provisions extend to this sector of the working population.

Moreover, the impact of this issue extends beyond professional employees themselves. It also affects coverage for many non-professional employees of relatively small professional corporations and similar entities. Since federal anti-discrimination statutes generally include a minimum number of employees in order to apply, *Cf.*, Title VII, 42 U.S.C. § 2000e(b) (15 employees); ADEA, 29 U.S.C. § 630(b) (20 employees); Family and Medical Leave Act, 29 U.S.C. § 2611(4)(A)(ii) (50 employees), ADA, 42 U.S.C. § 12111(5)(A) (15 employees), unless individuals such as petitioner are counted as "employees" under these statutes, a great number of clerical and technical employees will likewise be excluded from protection.[13]

The above statutory provisions evince no Congressional intent whatsoever to do what the First Circuit Court of Appeals has done: to ignore the structure of the entity and determine that an individual is not protected from discrimination, by virtue of certain attributes, typical in professional corporations, which are similar to those involved in traditional partnerships. In so doing, the court of appeals failed to recognize not only the ongoing discrimination which restricts employment opportunities for professionals who are women or members of racial, ethnic or religious minorities, but also the changes in the organization of the delivery of professional services and the role of the professional within such institutions.[14]

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[13] In light of the statutory caps in compensatory and punitive damages contained in Title VII, since the approval of the 1991 Civil Rights Act, 42 U.S.C. § 1981a(3), the issue will also impact upon the amount of compensation which will be available to victims of discrimination.

[14] The impact of this case is also far-reaching, given the fact that professions other than the law, such as the medical, architectural, engineering, dental professions and other similar endeavors, are also making increasing use of the professional corporation-type structure for the delivery of professional services.

II. THERE IS A SPLIT AMONG THE CIRCUITS, AND THE DECISION OF THE FIRST CIRCUIT IS INCONSISTENT WITH DECISIONS OF OTHER CIRCUITS.

The issue resolved by the First Circuit, whether an individual employed as a "partner" in a separate legal entity is entitled to the protection of the anti-discrimination laws, has been the focus of considerable debate in both the judiciary and in the legal community. *See*, Outen & Rasner, 2 LAW FIRM PARTNERSHIP & BENEFITS REPORT 4 (Sept. 1996) (stating that "[a] split has emerged in the federal circuits" concerning coverage as "employees" of members in professional corporations.)

There are essentially two lines of cases on this issue—either the courts consider the type of organization or entity to be decisive, with the result that individuals working for professional corporations and similar organizations are protected employees, or they take some form of a "factors" or "economic realities" approach, often excluding such individuals from the protection of the law, independently of the organizational form of the employing entity, by analogizing such an organization to a partnership.[15]

The First Circuit decision in the case at bar, explicitly deciding to disregard the organizational structure of the firm pursuant to the law of Puerto Rico, is in sharp contrast to the view of the Second Circuit Court of Appeals, as reflected in the seminal case of *Hyland v. New Haven Radiology Assocs*, 794 F.2d 793 (2nd Cir. 1986). *Hyland*

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[15] These courts also presume that *bona fide* partners are excluded from coverage, although this Court has never so determined. *Hishon v. King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) did not reach this issue, although Justice Powell filed a concurring opinion in which he stated that "the relationship among partners [should not be] characterized as an 'employment' relationship among partners [should not be] characterized as an 'employment' relationship to which Title VII would apply." 467 U.S. at 79 (Powell, J., concurring).

stands for the proposition that once professionals choose to adopt a separate organizational form, the organization (in that case a PC) is treated as a corporation for all purposes, regardless of its day-to-day functions and the role of the particular individual therein. Its employees, therefore, are covered by the anti-discrimination statutes (in that case ADEA). This "entity theory" approach recognizes that organisms such as the Puerto Rico *sociedad*, or the professional corporation organized under the laws of the fifty states, are legal entities which are separate and distinct from their members. Accordingly, there is no justification for the courts to look beyond the business organization formed by the co-venturers, in order to determine applicability of federal statutes.[16] *See, also, EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996), *cert. denied*, 1997 U.S. LEXIS 4590 (U.S. Oct. 6, 1997) (No. 96-1743).[17] *Accord, Johnson v. Cooper, Deans & Cargill, P.A.*, 884 F.Supp. 43 (D.N.H. 1994).

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[16] Of course, the "entity" approach, in which artificial, separate entities are respected, and employees thereof benefit from the protection of the laws prohibiting discrimination, does not necessarily require the opposite result with respect to traditional partnerships. It is entirely appropriate to utilize a multi-factor approach, such as that recently used in the case of *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir.), *cert. denied*, —— U.S. —— 117 S.Ct. 1862, 137 L.Ed.2d 1062 (1997) to determine whether a particular individual in a specific partnership qualifies as an "employee" or not. *See, also, Rosenblatt v. Bivona & Cohen*, 95 Civ. 4825 (SAS), 1997 U.S. Dist. LEIS 9506 (recognizing the co-existence of the entity theory protecting employees of professional corporations and the economic realities test with respect to those in traditional partnerships).

[17] The First Circuit below incorrectly stated that in *Johnson & Higgins*, "the Second Circuit appears to have retreated somewhat from this (entity) position," 119 F.3d at 987, n.3, App., p. 9a. *Johnson & Higgins* reaffirms *Hyland's* entity theory in its entirety. The Second Circuit noted, however, that there are organizations in which there may be *directors* or *officers* who, unlike the partners in professional corporations, do not in fact have *any* kind of employment relationship (measured by such factors as employee duties, regular employment by a separate entity, and a reporting relation-

The position taken by the First Circuit below is based on another key premise which is also in direct conflict with the view which has been expressed by the Second Circuit. The First Circuit states that "a single individual in a single occupational setting cannot be both an employer and an employee for purposes of Title VII", 119 F.3d at 985, and therefore presumes to exempt petitioner from coverage as an "employee", due to certain indicia of ownership and management. By contrast, the Second Circuit has observed that a single individual can have two roles within a particular organization. He or she can function, for example, both as a director or partner-shareholder and as an employee of a business entity, because "[t]he two can often exist side by side". *EEOC v. Johnson & Higgins*, 91 F.3d at 1539, and "there is nothing 'inconsistent between the co-existence of a proprietary and an employment relationship' "), quoting *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961).

The approach by the Sixth also diverges from that of the First Circuit. *EEOC v. The First Catholic Slovak Ladies Association*, 694 F.2d 1068 (6th Cir. 1982), *cert. denied*, 464 U.S. 819, 104 S.Ct. 80 (1983) addressed an issue analogous to the one at bar. Finding that a lower court had interpreted the equivalent definition of "employee" under ADEA "too narrowly", the Sixth Circuit reversed the court's exclusion of officers and members of the board of directors of a non-profit association from coverage as employees. The court of appeals saw nothing inconsistent with the dual role of governance and employee status, since the individual's "participation on the policy-

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ship to a superior) with the entity, and who therefore would not be covered under the anti-discrimination statutes. 91 F.3d at 1538-39. This exclusion of directors and officers who have no employment relationship with the entity in no way implies that those who do should likewise be excluded, due to their dual status.

making Board of Directors does not detract from their primary role as employees." 694 F.2d at 1070.

Although the Third Circuit has not directly addressed the issue in a published opinion, it has confirmed without opinion a lower court's determination that a partner in a professional corporation was an "employee" under Title VII. In *Jones v. Baskin, Flaherty, Elliot & Mannino, P.C.*, 670 F. Supp. 597 (W.D. Pa. 1987), aff'd without op. 897 F.2d 522 (3rd Cir. 1989), *cert. denied*, 498 U.S. 811, 111 S.Ct. 47, 112 L.Ed.2d 23 (1990), a discharged attorney was held to be an "employee" of a professional corporation within the meaning of ADEA, despite his status as a shareholder. The court rejected the defendant's argument that the plaintiff's position as a shareholder in a professional corporation was more closely analogous to that of a partner in a law partnership than to an employee. Assuming without deciding that the defendant's premise that the ADEA excludes partners from the protection against age discrimination was correct, the court stated that it still had to decide whether or not the particular individual was properly classified as a partner, and thus not an employee under ADEA. Critical to its decision that the plaintiff enjoyed status as an "employee" for the purposes of the anti-discrimination statutes was the fact that the defendant was a corporation rather than a partnership, with the court emphasizing that this fundamental structural difference undermined the assertion that the plaintiff enjoyed the rights and prerogatives of a member of a partnership.[18]

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[18] In reaching its conclusion, the court considered certain factors with regard to the organizational form, including the following, which are applicable with equal force to the case at bar: each shareholder of the defendant was paid as an employee; each shareholder received W-2 forms; the defendant withheld taxes from the shareholders' pay; and the professional corporation provided its attorneys with a place to work, furniture, equipment and the necessary secretarial and support staff.

On the other end of the spectrum, we have the views of the Seventh and Eleventh Circuits, expressed in the cases of *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984) and *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398 (11th Cir. 1991). Both of these appeals courts have chosen to ignore the organizational form adopted by the co-venturers, analogizing the role of a PC shareholder to a partner in a traditional partnership. Reasoning that the management, control and ownership of a PC parallels that of a partnership, and accepting the view that partners are automatically excluded from protection, these two circuits have effectively excluded a large sector of working professionals from the protection of the anti-discrimination laws.

In a divided opinion, the Eighth Circuit recently reached a similar result. *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996), *cert. denied* —— U.S. ——, 117 S.Ct. 1694, 137 L.Ed.2d 821 (1997) involved a paralegal employee of a professional corporation, who alleged that she was the victim of sexual harassment and that she was dismissed from her employment in retaliation for her harassment complaint. The issue brought before the court in a dispositive motion was whether the firm had the requisite number of employees under Title VII. Despite the fact that the law firm had recently changed its form from a partnership to a professional corporation, the Eighth Circuit panel simply chose to disregard the organizational form of the entity, finding that the attorney-shareholders were not to be counted for the purpose of the minimum number of employees required for Title VII coverage. The result was that a non-attorney who allegedly was a victim of sexual harassment and retaliation was denied any protection under the law.

The *Devine* decision, however, did not represent the unanimous view of the Eighth Circuit. In dissent, Judge Heaney expressly adopted the Second Circuit's *Hyland*

approach, stating that "the shareholders of a professional corporation fall under the general statutory definition of employee: they are employed by the corporation." 100 F.3d at 82. The dissent took note of the fact that these shareholders, like petitioner herein, are paid salaries, from which taxes are withheld, and receive insurance, pension and health benefits from their employer. Moreover, the dissent discussed the remedial purpose of the anti-discrimination laws, while noting that "[a]lthough this interpretation of Title VII exposes professional corporations to potential liability, *it also offers to all of the shareholders, particularly the less senior ones, protection from discriminatory conduct.*" 100 F.3d at 82 (emphasis supplied).

In summary, the law regarding the "employee" status of individuals whose employment relationship with a professional services firm is analogous to that of the petitioner herein, is in a state of uncertainty and conflict. While in some areas of the country, these individuals have been able to pursue employment discrimination actions, in others, there has been a large-scale exclusion of such professionals, particularly those who are nearing the glass ceiling, from the coverage of anti-discrimination laws. There is a compelling need for the Court to resolve these conflicts and to state clearly that those individuals who are in an employment relationship with a separate legal entity must be afforded coverage under the law, despite the fact that they may also enjoy some formal trappings of the powers traditionally associated with partnerships.

III. THE DECISION BELOW IS INCORRECT AND INCONSISTENT WITH THE REMEDIAL PURPOSE OF TITLE VII.

The decision of the lower court, with its resultant large-scale exemption of professionals from the coverage of Title VII, is clearly misguided. In its flawed analysis, the court of appeals first assumed the correctness of those

decisions which exclude members of a partnership from the protection of Title VII. It then proceeded to take the restrictions a step further, exempting individual professionals who are in employment relationships with separate entities which differ in form and substance from the traditional aggregate partnership. In ignoring the organizational form of the respondent law firm, the court of appeals interpreted Title VII in a restrictive manner, inconsistent with both the purpose of the statute and the prior decisions of this Court.

After this court's decision in *Hishon v. King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), holding that an associate in a law firm enjoyed Title VII protection with respect to consideration for partnership, the coverage of attorneys and other professionals who are members of traditional partnerships has been the subject of great controversy in the lower courts.[19] *See*, L. Pokora, *Partners as Employees under Title VII: The Saga Continues, A Comment on the State of the Law*, 22 OHIO N.U.L. REV. 249 (1995); T. Ferguson, *Partners as Employees under the Federal Employment Discrimination Statutes: Are the Roles of Partner and Employee Mutually Exclusive?*, 42 U. MIAMI L. REV. 699 (1988). *Hishon*, however, did not touch upon the question now presented for review in this petition: i.e., the protection to

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[19] Although Justice Powell's separate concurrence in *Hishon* has been widely cited for the proposition that Title VII should not apply to decisions among partners *inter se*, *id.*, at 79, there is nothing in the *Hishon* majority opinion which requires such a result. Indeed, even Justice Powell's concurrence allows for the possibility that an employer might try to "evade the strictures of the Title VII simply by labeling its employees as 'partners'. *Id. See, also Hopkins v. Price Waterhouse*, 920 F.2d 967, 978 (D.C. Cir. 1990), in which the appellate court, on remand from this Court, noted that a woman partner who suffers discrimination after admission to partnership may still be protected under the statute, if the admission to partnership was a "subterfuge for discrimination", or if she suffered retaliation for her previous assertion of her Title VII rights.

be afforded professional service providers who are actually employed by entirely separate, independent entities, in which they may still have the designation as "partner" or "shareholder".

The narrow interpretation by the First Circuit, effectively excluding such individuals from coverage if they enjoy certain managerial or ownership attributes, is at odds with this Court's mandate that Title VII is to be afforded a liberal interpretation and is "intended to be broadly inclusive." *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981). In making its exclusion decision, moreover, the First Circuit ignored this Court's admonishment to "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, *without clear congressional mandate*." *Id.*, at 178 (emphasis supplied).

Neither the language of the statute nor its legislative history reveal any intent whatsoever to exclude such persons from coverage. Although the circular statutory definition of "employee" offers little guidance in discerning the meaning of the term,[20] there is no justification for the conclusion by the First Circuit that the word should therefore be interpreted in a manner which is not only restrictive, but also inconsistent with the meaning of the term in ordinary parlance.

It is blackletter law that "[i]n the absence of any indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.' " *Walters v. Metropolitan Educational Enterprises*, —— U.S. ——, 117 S.Ct. 660, 664, 136 L.Ed.2d 644 (1997) (citation omitted). "[L]egislation, when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on

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[20] "Employee" is defined as "an individual employed by an employer," 42 U.S.C. § 2000e(f).

ordinary words addressed to him." *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618, 64 S.Ct. 1215, 88 L.Ed. 1488 (1944).

In common parlance, the word "employee" presents no great mystery. The dictionary definition refers to any "person who works for another in return for financial or other compensation," AMERICAN HERITAGE DICTIONARY 604 (3d ed. 1992), or "one who is hired by another, or by a business firm, etc., to work for wages or salary", WEBSTERS NEW TWENTIETH CENTURY UNABRIDGED DICTIONARY 595 (2d ed. 1983). Unless Congress has provided an explicit statutory definition or explanation to the contrary, the word should be interpreted in accordance with this commonly understood meaning. Plainly, an individual such as the petitioner, whose employer pays her wages and withholds all pertinent taxes therefrom, provides her with insurance and pension benefits, and controls the conditions of her work, comes under the common meaning of the word "employee".

There was no reason, moreover, for the court of appeals to have disregarded this Court's directive that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980). Over the years, the Congress has enumerated a number of exceptions to the Title VII's general prohibition against employment discrimination, none of which are applicable to the case at bar. Certain employees of religious corporations, associations, educational institutions or societies are exempted from the law's coverage, 42 U.S.C. § 2000e-1, as are employees of *bona fide* private membership clubs, 42 U.S.C. § 2000e(b). Also exempt from coverage are individuals who work for employers with fewer than fifteen employees, 42 U.S.C. § 2000e(b), and persons elected to public office, as well

as those directly appointed by such elected officials, 42 U.S.C. § 2000e(f). There is, however, no exception or special rule for professionals such as petitioner, other than those which have been judicially created.

Indeed, through actions taken after the initial passage of Title VII, the Congress has continued to manifest its concern about the invidious effect of discrimination against those minorities and women who have reached the higher levels of the employment spectrum. Thus, for example, in 1972, Congress rejected a proposal to exclude physicians and surgeons employed by public or private hospitals from Title VII coverage.[21] And in 1991, Congress created the Federal Glass Ceiling Commission, mandating it to conduct a study of the artificial barriers which have affected the entry of women into management and decision-making positions in corporate America, in spite of some thirty years of civil rights protections. Pub. L. 102-166, Title VII, Nov. 21, 1991, 105 Stat. 1081. Plainly, such an analysis did not contemplate any exemption for those who face such barriers in the context of the delivery of professional services.

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[21] Senator Javits spoke out against the proposal, stating as follows:

> "One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water, that only the blue collar jobs and ditchdigging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life. . . .
>
> "Yet this amendment would go back beyond decades of struggle and of injustice and reinstate the possibility on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority, and that they have to subject to discrimination in respect of it, and the Federal Law will not protect them." 118 Cong. Rec. 3802 (1972).

Entities such as the *sociedad* in Puerto Rico and the professional corporations in the fifty states are in many respects indistinguishable from the corporate organization typical in other spheres of the economy. There simply is no reason for the courts to exempt this one form of entity from the provisions of the anti-discrimination statutes. While it is certainly true that these entities share similarities with traditional partnerships, the courts cannot ignore the reality that they share other similarities with corporations, in that they are separate, independent organisms which employ individuals and control the terms and conditions of their work. Rather than excluding those who are in employment relationships with such entities from the coverage of the important laws against discrimination, the courts should be about the business of assuring the protection of such individuals from the discrimination they face.

In today's marketplace, there are significant advantages to the organization of professional practices through the mechanism of a separate entity. Through such organizational forms, professional firms reap significant benefits, in terms of tax considerations, pension structures, and the deductibility of employee emoluments. It would indeed be ironic if organizations such as the *sociedad* and the professional corporations were treated in a manner different from the rest of corporate America, precisely at the time when greater numbers of women and minorities are making their ways into the professions. The co-venturers who go the path of the separate, independent entity should not be able to have it both ways: benefitting from the organizational structure they have determined as most advantageous, while maintaining impunity from the responsibilities which flow from the form of the organization they have chosen. The employees of such entities need the protection of the law; nothing in the language of the statute, the legislative history of the act, or the prior decisions of this Court require a different result.

IV. THE INCLUSION OF EMPLOYEES SUCH AS PETITIONER IN TITLE VII COVERAGE WILL HELP TO BREAK THE GLASS CEILING AND ERADICATE THE DISCRIMINATION WHICH STILL EXISTS IN THE UPPER ECHELONS OF THE LEGAL PROFESSION.

Although the days when Myra Bradwell was prohibited from practicing law are long past,[22] ongoing discrimination against women in the legal profession is an unfortunate reality. See, for example, *Women in the Law: a Look at the Numbers*, American Bar Association, Dec. 1995, at p. 7 (noting the continuing practices of gender disparity in partnership ranks); *Unfinished Business: Overcoming the Sisyphus Factor*, American Bar Association, 1995, in which the chairperson of the EEOC, Gilbert F. Casellas, is quoted as saying, "an industry with one of the most abominable and embarrassing records has to be that industry comprised of America's largest law firms. It is overwhelmingly male and predominantly white. How many other billion dollar industries . . . have managed to survive serious and sustained legal challenge? It is just cause for some professional soul searching and some concrete corrective action."

In creating the Glass Ceiling Commission, Congress manifested its concern about the protection of high echelon employees from discrimination. The legislative history of the act not only took note of the fact that discrimination was a cause for the arbitrary barriers to advancement, but also specifically used the example of sex discrimination by law firms as a specific example in its discussion of the problem.[23] After completing its studies, the Commission concluded that the Glass Ceiling was no figment

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[22] *Bradwell v. Illinois*, 83 U.S. 130, 141, 21 L.Ed. 442 (1872), referring to the "divine ordinance" and the "nature of things" as justifying the exclusion of women from the legal profession.

[23] Civil Rights Act and Women's Equity in Employment Act of 1991, H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 1, at 19-20.

of the imagination. Recognizing that "[w]orkplace discrimination presents a significant glass ceiling barrier for minorities and women," recommended that federal enforcement agencies increase their efforts to enforce existing laws by expanding efforts to end systemic discrimination . . . .", and reported that "[w]hile minorities and women have made strides in the last 30 years . . . the executive suite is still overwhelmingly a white man's world. Over half of all Master's degrees are now awarded to women, yet 95% of senior-level managers of top *Fortune* 1000 industrial and 500 service companies are men." *A Solid Investment: Making Full Use of the Nation's Human Capital*, Recommendations of the Glass Ceiling Commission, Washington, D.C. 1995, at pp. 10 and 31.

No less can be said of the top-level positions in the nation's law firms.[24] Although by and large, women are no longer kept out of the profession altogether, largely because of the passage and implementation of anti-discrimination laws, the structure of the profession continued to keep them out of powerful positions within the law. The interpretations by many courts excluding "partners" from the shelter of the law have had this discriminatory effect. The failure of other courts to give credit to the separate organizational form adopted in many professional endeavors carves out further holes through which the discriminators can squeeze. Clearly, the Congressional purpose to eradicate discrimination is thwarted through restrictive judicial interpretations such as that of the First Circuit in the case at bar.

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[24] It is clear that the glass ceiling is not shattered once a woman makes a partner. See e.g., *Glass Ceiling Commission Hears Plaintiff Lawyer*, Lab. L. Rep. (CCH) No. 494, at 6 (May 17, 1994) (plaintiff's attorney informs the Commission that women who make partner face the reality that civil rights laws may no longer protect them because court decisions do not include partners in the definition of employee.)

CONCLUSION

As more women and minorities have entered the professions, and indeed are often the workhorses responsible for the attainment of economic success in many such businesses, they have largely been excluded from any real power within professional firms, and have been the subject of continuing discrimination. A blanket exclusion of partners in professional corporations and similar entities from the protection of the anti-discrimination statutes only serves to perpetuate this discrimination. The result of such an exclusion is devastating, effectively carving out large exceptions to the anti-discrimination laws. The decision of the lower court is inconsistent not only with the statute, but also with the intent of Congress, as well as the prior decisions of this Court. It represents a major setback in the fight to eliminate the discrimination which continues to this day in the ranks of the professions throughout the United States.

A writ of certiorari should be granted to review, and ultimately reverse, the decision of the First Circuit Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2251

MARGARITA SERAPION,
Plaintiff, Appellant,

v.

FRED H. MARTINEZ *et al.*,
Defendants, Appellees.

Appeal from the United States District Court
for the District of Puerto Rico
[Hon. Salvador E. Casellas, *U.S. District Judge*]

Before Selya, *Circuit Judge*
Coffin and Cyr, *Senior Circuit Judges*

July 18, 1997

SELYA, *Circuit Judge*. This appeal requires us to explore a gray area in the emerging jurisprudence of Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1994). Having completed that task, we conclude that while Title VII's employment-related shelter might in certain circumstances extend to a person who is a partner in a law firm, plaintiff-

appellant Margarita Serapión, a partner in the now-disbanded law firm of Martínez, Odell, Calabria & Sierra (the Firm), is not entitled to such shelter here. Consequently, we affirm the lower court's entry of summary judgment in the defendants' favor.

In explaining our rationale, we take a slightly unorthodox course. We begin with the facts, then shift to a discussion of the statutory scheme, and then resume our historical account by describing the course of the litigation. In succession, we thereafter rehearse the summary judgment standard, limn the doctrinal parameters of the requisite Title VII inquiry, address the merits, iron out a procedural wrinkle, and at long last conclude.

I. THE FACTUAL PREDICATE

Serapión earned a distinguished reputation as a certified public accountant before deciding to switch careers. After graduating from the University of Puerto Rico Law School with honors in 1982, she joined the San Juan law firm of Colorado, Martínez, Odell, Calabria & Sierra as an associate. She left in 1983 for a stint in government service but returned in 1985. In the interim, Colorado had departed and the partnership had been reconstructed. Approximately one year later, the appellant was admitted into the Firm as a "junior" partner (sometimes termed a "non-proprietary" partner). While this status did not give her any equity position, it did give her some profit distribution units (PDUs)[1] and enabled her to participate in meetings of the Board of Partners (a body which comprised all the partners, senior and junior—in the aggregate, roughly half

[1] Each partner received an allotment of PDUs, and the Firm's profits were distributed periodically to the partners in proportion to the number of PDUs which each partner held. These distributions were over and above the recipients' base salaries. At all times material hereto, the name partners held 100 PDUs apiece. The junior partners held varying amounts, ranging from 20 to 45 PDUs apiece.

the Firm's lawyers—and which had the ultimate responsibility for management and policymaking).

In 1990, Serapión became what is variously described as a "senior" or "proprietary" partner. Therefore the Firm's four name partners (all males) were the only other proprietary partners. They enjoyed equality among themselves in respect to compensation, PDUs, benefits, and equity, and they promised Serapión that she would be elevated to an equal partnership in three years. In the meantime, her status as a proprietary partner brought about several changes in her working conditions: she received a 4% equity interest in the Firm (ceded 1% by each name partner); she assumed *pro rata* liability for the Firm's debts, losses, and other obligations; and she became a voting member of the Executive Committee (a five-member group which was responsible for the Firm's day-to-day management). When the appellant became a proprietary partner, the Firm increased her allocation of PDUs to 75 units. Concomitantly, she began reaping a correspondingly larger share of the Firm's profits. Under the terms of the 1990 agreement, her allotment of PDUs (and, therefore, her share of the profits) was to continue to rise in increments until the end of 1992 when Serapión would achieve full parity with the four name partners.

Despite these emoluments, Serapión was not on an equal footing with the name partners. Each of them had a greater equity interest (24% apiece) and a more munificent compensation package (roughly one-third higher than hers in 1990, although the gap gradually closed). The difference in compensation was largely, if not entirely, a function of the disparate allocation of PDUs. Still, although her allotment of PDUs was less than that of the name partners, it was nontheless significantly greater than that of even the most well-endowed junior partner.

Serapión alleges that three of her partners (Fred H. Martínez, Lawrence Odell, and José Luis Calabria) never

intended that a woman would achieve parity. These partners, she says, connived to prevent her from reaping the fruits of her bargain, eventually demanding that she sign an agreement which would have significantly diminished her authority within the Firm. When Serapión stood her ground, the trio caused the Firm to dissolve in 1992 (shortly before the expiration of the three-year phase-in period) and simultaneously forged a new partnership called "Martínez, Odell & Calabria." The nascent firm included the three men, as well as most of the Firm's other lawyers. The founders did not invite either Serapió or Sierra (the remaining proprietary partner) to join.

II. THE STATUTORY SCHEME

We pause at this juncture to sketch the legal landscape. Title VII is one of the brightest stars in the firmament of this nation's antidiscrimination laws. Generally speaking, it bars certain employment-related actions undertaken on the basis of impermissible criteria (such as gender). *See, e.g., Smith* v. *F.W. Morse & Co.*, 76 F.3d 413, 420 (1st Cir. 1996). In relevant part, Title VII provides:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

The Firm is plainly an employer for Title VII purposes. After all, an employer is defined by statute as "a person engaged in an industry affecting commerce," and the statute makes clear that "a person" in this context can include a partnership. *Id.* at § 2000e(a)-(b). The rub is whether Serapión is an employee.

Although the language we have quoted speaks of "any individual," courts long ago concluded that Title VII is directed at, and only protects, employees and potential employees. *See, e.g., Vera-Lozano* v. *International Broad.*, 50 F.3d 67, 69 (1st Cir. 1995); *Broussard* v. *L. H. Bossier, Inc.*, 789 F.2d 1158, 1159 (5th Cir. 1986); *see generally Keyes* v. *Secretary of the Navy*, 853 F.2d 1016, 1026 (1st Cir. 1988) (noting that "Title VII does not presume to obliterate al manner of inequity"). We know, moreover, that a single individual in a single occupational setting cannot be both an employer and an employee for purposes of Title VII. *See, e.g., Devine* v. *Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 80-81 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1694 (1997); *EEOC* v. *Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 (7th Cir. 1984); *Johnson* v. *Cooper, Deans & Cargill*, 884 F. Supp. 43, 44 (D.N.H. 1994). Even so, the parameters of the term "employee" have proven elusive. Title VII defines an employee only as "an individual employed by an employer," 42 U.S.C. § 2000e(f), a turn of phrase which chases its own tail. *See Broussard*, 789 F.2d at 1160; *see also Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 323 (1992) (terming nearly identical language in the ERISA statute, 29 U.S.C. § 1002(6), "completely circular").

Given the unhelpful nature of the supplied definition, we are compelled to look for assistance in other federal antidiscrimination statutes that contain similar definitions of "employee," such as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1994), the Employee Retirement and Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1994), and the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1994). We regard Title VII, ADEA, ERISA, and FLSA as standing *in pari passu* and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another. *See, e.g., Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979); *Lorillard* v.

Pons, 434 U.S. 575, 584 (1978); *Wheeler* v. *Hurdman*, 825 F.2d 257, 263 (10th Cir. 1987); *Hyland* v. *New Haven Radiology Assocs.*, 794 F.2d 793, 796 (2d Cir. 1986).

Of course, we are not remitted solely to statutory parallels. There is a developing jurisprudence under Title VII. In it, we detect precedential value not only in cases which actually involve partnerships, but also in decisions which have determined the status of individuals by analogy to a partnership paradigm (even though the individuals involved were principals of entities other than partnerships). *See, e.g., Devine*, 100 F.3d at 80-81; *Fountain* v. *Metcalf, Zima & Co.*, 925 F.2d 1398, 1399-1401 (11th Cir. 1991). We do not, however, hitch our wagon to cases deciding whether a particular individual is an employee as opposed to an independent contractor. That distinction is between those who are part of an employer's business and those who are running their own businesses, and the factors central to that inquiry are inapposite here. *See Wheeler*, 825 F.2d at 271-72.

There are also a few cases which deal directly with whether a partner in a professional practice should be regarded as an employee for the purpose of Title VII (and, therefore, entitled to its safeguards). The seminal case is *Burke* v. *Friedman*, 556 F.2d 867, 869-70 (7th Cir. 1977), in which the court held that partners in an accounting firm were not employees vis-a-vis Title VII. This interpretation received a modicum of support in *Hishon* v. *King & Spalding*, 467 U.S. 69 (1984). Although the *Hishon* Court answered a different question—holding that Title VII precluded a law firm from denying partnership consideration to an associate on the basis of her gender, *see id.* at 76-78—Justice Powell cautioned that the majority opinion did "not require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply." *Id.* at 79

(Powell, J., concurring). Since *Hishon,* several appellate courts have followed Justice Powell's lead and declared, with varying nuances, that partners are not protected as 1996), *cert. denied,* 117 S. Ct. 1862 (1997); *Wheeler,* employees under federal antidiscrimination laws. *See Simpson* v. *Ernst & Young,* 100 F.3d 436, 443 (6th Cir. 825 F.2d at 263; *accord* EEOC Decision No. 85-4, 2 Empl. Prac. Guide (CCH) ¶ 6846,, at 7040-41 & n.4 (1985).

As we visualize it, the key inquiry is into the attributes of the relationship between the partnership and those whom it styles as partners. The method by which this inquiry is to be conducted—how a court determines whether an individual labelled as a partner is to be treated as an employee for purposes of Title VII—is an unresolved issue which lies at the epicenter of this appeal.

III. THE LITIGATION

When her three former partners folded the Firm and dashed her expectations of proprietary parity, Serapión sued them and their new firm (Martínez, Odell & Calabria) in Puerto Rico's federal district court. She charged in her complaint that the defendants had violated both Title VII and local law. After the defendants' early attempt to obtain summary judgment misfired,[2] the parties engaged in pretrial discovery. Thereafter, the defendants renewed their quest for *brevis* disposition. Their new motion relied on alternative grounds. It averred that Serapió, as a partner in the Firm, was not an employee (and, therefore, had no recourse to Title VII). It also averred that Serapión had not adduced any competent proof that gender-based discrimination caused the Firm's disintegration (an event which the defendants attributed to irrecon-

[2] When the defendants filed their initial motion for summary judgment, Chief Judge Cerezo denied it. The case was subsequently transferred to Judge Casellas' calendar as part of a redistribution of cases ancillary to his assumption of judicial office.

cilable differences between two warring factions of proprietary partners).

Judge Casellas granted the defendant's motion, holding that Serapión was not an employee as that term had been developed in federal jurisprudence and that she was thus ineligible for the prophylaxis of Title VII. *See Serapión* v. *Martínez,* 942 F. Supp. 80, 84-85 (D.P.R. 1996). The court held alternatively that Serapión had failed to make out a prima facie case of discrimination under Title VII. *See id.* at 85-87. Finally, the court refused to exercise supplemental jurisprudence over the pendent claim and dismissed that claim without prejudice to its pursuit in the courts of Puerto Rico. *See id.* at 88-89. This appeal followed.

IV. THE SUMMARY JUDGMENT STANDARD

While the origins of the summary judgment standard may have been important in the distant past, modern federal practice has reached a point at which the standard has achieved aphoristic acceptance, rendering the attribution of specific authorship superfluous. We thus present the standard without particularized citation, referring readers interested in further exposition to the long litany of decisions that have placed a gloss on the language of Fed. R. Civ. P. 56(c). *See McCarthy* v. *Northwest Airlines, Inc.,* 56 F.3d 313, 315 (1st Cir. 1995) (collecting cases); *Coyne* v. *Taber Partners I,* 53 F.3d 454, 457 (1st Cir. 1995) (same).

Summary judgment is a means of determining whether a trial is actually required. It is appropriately granted when the record shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Thus, in order to defeat a properly crafted summary judgment motion, the party opposing it must demonstrate that a trialworthy issue looms as to a fact which potentially affect the outcome of the suit.

A trial or appellate court considering the merits of a summary judgment initiative must peruse the record in the light most favorable to the nonmovant. While this equation must take into account all properly documented facts, the court may ignore unsupported conclusions, rank speculation, and opprobrious epithets. If the evidence, so viewed, reveals a genuine dispute over a material fact—that is, if a reasonable factfinder, examining the evidence and drawing all reasonable inferences in the required manner, could resolve a factual controversy which is critical to the outcome of the case in favor of the nonmoving party —then summary judgment will not lie.

Where, as here, the district court enters summary judgment, we review its ruling *de novo*.

V. THE DOCTRINAL PARAMETERS

Putting this appeal into proper perspective requires us to articulate the doctrinal parameters which inform an inquiry into a partner's status vis-à-vis Title VII. We divide our discussion into two segments.

A.

Partnerships are mutable structures, and partners come in varying shapes and sizes. Consequently, attempting to delineate the circumstances in which a particular partner should be regarded as an employee for Title VII purposes is tricky business. Although one court has hinted at the desirability of a *per se* rule, saying in effect that all members of professional services corporations were employees for purposes of the antidiscrimination laws (there, the ADEA), no matter how significant a role they played in managing the affairs of the corporation, *see Hyland*, 794 F.2d at 797-98,[3] we reject the notion that labels can con-

[3] We note that the Second Circuit appears to have retreated somewhat from this position. *See EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529, 1538-39 (2d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3755 (U.S. May 1, 1997) (No. 96-1743).

clusively resolve status inquiries. We hold instead that the Title VII question cannot be decided solely on the basis that a partnership calls—or declines to call—a person a partner. A court must peer beneath the label and probe the actual circumstances of the person's relationship with the partnership. *See Devine,* 100 F.3d at 80-81; *Fountain,* 925 F.2d at 1400-01; *see also* Hishon, 467 U.S. at 79 n.2 (Powell, J., concurring) ("Of course, an employer may not evade the strictures of Title VII simply by labelling its employees as 'partners.' "); *see generally Board of Trade* v. *Hammond Elevator Co.,* 198 U.S. 424, 437-38 (1905) (holding that the manner in which the parties to an agreement designate their relationship is not controlling). In other words, partnerships cannot exclude individuals from the protection of Title VII simply by draping them in grandoise titles which convey little or no substance.

In our judgment, the correct course is to undertake a case-by-case analysis aimed at determining whether an individual described as a partner actually bears a close enough resemblance to an employee to be afforded the protections of Title VII. *See Strother* v. *Southern Cal. Permanente Med. Group,* 79 F.3d 859, 867-68 (9th Cir. 1996) (reversing grant of summary judgment where the trial court based its status determination principally on the fact that the plaintiff was called a partner); *see also Devine,* 100 F.3d at 81 (holding, in a case involving a professional services corporation, that a court should not treat either the individual's title or the entity form as determinative). After all, form should not be permitted to triumph over substance when important civil rights are at stake.

We also reject a variation on the *per se* theme advanced by the appellant. She asseverates that, due to the peculiarities of Puerto Rico's civil law structure, all partners in all Puerto Rico partnerships must be considered employees for

purposes of Title VII. In a civil law system, this theory goes, a partnership is not merely a banding together of individual partners but a separate entity which must itself be considered the employer of all the individual partners.

We need not delve too deeply into the hotly disputed question of whether the appellant's construct is sound as a matter of Puerto Rico law. It is enough for our purposes that the construct is unsound as a matter of *federal* law. The appellant cites no apposite authority for the novel proposition that the status of an individual under Title VII should vary depending on the law of the state in which a partnership entity is chartered or in which a claim arises. We think that the reverse is true: whether an individual is an employee for purposes of Title VII is a matter of federal law, and the question must be answered with reference to principles of federal law. *Accord Broussard*, 789 F.2d at 1159-60; *Cobb* v. *Sun Papers, Inc.*, 673 F.2d 337, 339 (11th Cir. 1982); *Lambertsen* v. *Utah Dep't of Corrections*, 922 F. Supp. 533, 536 (D. Utah 1995), *aff'd*, 79 F.3d 1024 (10th Cir. 1996).[4] This determination is grounded in both Supreme Court case law and strong federal policies of uniformity and fairness.

In *Robinson* v. *Shell Oil Co.*, 117 S. Ct. 843 (1997), the Court decided that the word "employee," as used in the antiretaliation section of Title VII, 42 U.S.C. § 2000e-3(a), included former as well as current employees. *See id.* at 849. In resolving this issue, the Court ignored state law, concentrating instead on the statute itself and on federal jurisprudence. *See* id. at 846-48. The Court took a similar approach in *Walters* v. *Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 663-66 (1997), resolving the scope of the words "employee" and "employer" under Title VII by reference solely to federal statutes and judi-

[4] The *Broussard* decision is of particular interest because the claim which was considered there arose in Louisiana—a jurisdiction which, like Puerto Rico, has a civil law tradition.

cial opinions. So, too, in *Darden*, 503 U.S. at 322-23 & n.3, the Court determined the meaning of "employee" under ERISA through the application of established common law principles (rejecting the idea that the term incorporated the law of any particular state).

These cases are merely specific applications of the widely accepted principle that, in the absence of plain indication of a contrary intent, courts ought to presume that the interpretation of a federal statute is not dependent upon state law.[5] *See, e.g., Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989); *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 119 (1983); *United States* v. *De Luca*, 17 F.3d 6, 8-9 (1st Cir. 1994).

Our refusal to give state law controlling weight on this question not only comports with the case law but also makes common sense. Linking status determinations to local law would make a important federal statute mean different things in different states. This sort of checkerboarding would undermine Congress' easily discerned intent that Title VII sand as a national code of conduct in the struggle to ensure equality of treatment in the workplace. *See* 110 Cong. Rec. 13,088-13,091 (1964). Moreover, since the United States is home to in excess of 1,000,000 operating partnerships, numbering over 13,000,000 individual partners, *see U.S. Bureau of the Census, Statistical Abstract of the United States* 535 (116th ed. 1996), relegating status determinations to local law would create enormous confusion and widespread uncertainty.

In regard to Title VII, there is no basis for departing from the precept that "federal statutes are generally intended to have uniform nationwide application," *Missis-*

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[5] We are unimpressed by the appellant's attempted analogy to a line of cases involving the federal tax laws. *See, e.g., Morgan* v. *Commissioner*, 309 U.S. 78 (1940). The appellant has not called to our attention any court which has accepted those cases as persuasive in the Title VII context, and we decline to be the first.

sippi Band of Choctaw Indians, 490 U.S. at 43, and there is every reason for adhering to it. Here, moreover, the possibility that defining the term "employee" by reference to local law would open the door for state legislatures to adopt restrictive definitions and thereby defeat Title VII's broad remedial purposes militates strongly in favor of a uniform national standard. *Cf. United States* v. *Kimbell Foods, Inc.,* 440 U.S. 715, 728 (1979) (suggesting that, in cases in which the application of state law would frustrate the specific objectives of a federal program, establishing uniform federal rules is appropriate). Thus, we hold that the meaning of the term "employee," as that term is used in Title VII, must be derived through an analysis of federal statutes, legislative history, judicial decisions, and common law understandings, not through the law of Puerto Rico.

B.

Having determined that federal law controls the question of the appellant's status, we turn next to an analysis of those attributes of a partner's relationship to the partnership which may influence the decisional calculus. In this endeavor, we do not write on a pristine page. Two other courts of appeals have tried their hands at plotting the line which divides partners who may be treated as employees under federal antidiscrimination statutes from those who may not.

In *Simpson,* the Sixth Circuit considered the status for ADEA purposes of an individual denominated a partner by an international accounting firm. In attempting to ascertain whether the plaintiff, notwithstanding his title, qualified as a person protected by the ADEA, the court weighed factors such as:

> the right and duty to participate in management; the right and duty to act as an agent or other partners; exposure to liability; the fiduciary relationship among partners . . . participation in profits and

> losses; investment in the firm; partial ownership of firm assets; voting rights; the aggrieved individual's ability to control and operate the business; the extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits; the extent of that individual's employment security; and other similar indicia of ownership.

Simpson, 100 F.3d at 443-44. Concluding that the plaintiff more closely resembled an employee than a proprietor—the court noted particularly that the plaintiff had no right either to participate in the partnership's management decisions or to vote for those who did, and that his compensation was not determined on the basis of the firm's profits—the court allowed the plaintiff to sue under the ADEA. *See id.* at 441-43.

The Tenth Circuit grappled with the same sort of conundrum in *Wheeler*, a case which also involved a partner in an accounting firm. In determining that the plaintiff was not an employee for purposes of either Title VII or the ADEA, the *Wheeler* court focused on her participation in firm profits and losses, her exposure to liability, her investment in the firm, and her voting rights under the partnership agreement. *See Wheeler*, 825 F.2d at 276.

Other cases, though not involving partnerships, are useful in our analysis. In *Devine*, for example, the Eighth Circuit, in deciding whether attorneys who were shareholders and directors in a professional services corporation were employees for Title VII purposes, stated that courts should "look to the extent to which [the attorneys] manage and own the business." *Devine*, 100 F.3d at 81. The court proceeded to consider factors such as the attorneys' ability to participate in setting firm policy, the extent of their contributions to firm capital, their liability for firm debts, and the correlation (or lack of correlation) between their compensation and the firm's profits. *See id.*

In a comparable situation, the Eleventh Circuit evaluated the ADEA claim of a member-shareholder of an accounting firm by weighing elements such as the plaintiff's ability to share in firm profits and whether his compensation was a function of those profits; the plaintiff's liability for the firm's losses, debts, and obligations; and the extent of the plaintiff's right to vote on major firm decisions. *See Fountain,* 925 F.2d at 1401. The court dismissed an assertion that the "autocratic" actions of the firm's president constituted a reasonable basis for concluding that the plaintiff constituted a reasonable basis for concluding that the plaintiff was an employee. "Domination by an 'autocratic' partner over others is not uncommon and does not support a finding that the others are 'employees.' " *Id.*

We think that these cases provide valuable guidance concerning the factors which courts must consider in making status determinations under Title VII. In large, the critical attributes of proprietary status involve three broad, overlapping categories: ownership, remuneration, and management. Within these categories, emphasis will vary depending on the circumstances of particular cases. Nonetheless, although myriad factors may influence a court's ultimate decision in a given case, we recount a non-exclusive list of factors that frequently will bear upon such determinations.

Under the first category, relevant factors include investment in the firm, ownership of firm assets, and liability for firm debts and obligations. To the extent that these factors exist, they indicate a proprietary role; to the extent that they do not exist, they indicate a status more akin to that of an employee.

Under the second category, the most relevant factor is whether (and if so, to what extent) the individual's compensation is based on the firm's profits. To the extent that a partner's remuneration is subject to the vagaries

of the firm's economic fortunes, her status more closely that a partner is paid on a straight salary basis, the argument for treating her as an ordinary employee will gain strength. A second potentially relevant factor in this regard relates to fringe benefits. An individual who receives benefits of a kind or in an amount markedly more generous than similarly situated employees who possess no ownership interest is more likely to be a proprietor.

Under the third category, relevant factors include the right to engage in policymaking; participation in, and voting power with regard to, firm governance; the ability to assign work and to direct the activities of employees within the firm; and the ability to act for the firm and its principals. Once again, to the extent that these factors exist, they indicate a proprietary role.

We add a note of caution. Status determinations are necessarily made along a continuum. The cases that lie at the polar extremes will prove easy to resolve. The close cases, however, will require a concerned court to make a case-specific assessment of whether a particular situation is nearer to one end of the continuum or the other. In performing this assessment, no single factor should be accorded talismantic significance. Rather, a status determination under Title VII must be founded on the totality of the circumstances which pertain in a particular case. Given these verities, any effort to formulate a hard-and-fast rule would likely result in a statement that was overly simplistic, or too general to be of any real help, or both.

VI. MERITS

To complete our journey, we must undertake a particularized analysis aimed at determining whether the lower court, *at the summary judgment stage*, appropriately could conclude that Serapión was not an employee of the Firm within the purview of Title VII. Consistent

with the summary judgment protocol, we focus only on uncontested documentary proof, such as the provisions of the partnership agreement and the minutes of the Firm's Executive Committee meetings (every page of which bears the appellant's initials), supplemented by facts asserted by the appellant and those conceded by her.

The factors relevant to ownership and remuneration provide powerful indications that the appellant should not be treated as an employee for Title VII purposes. It is undisputed that Serapión received an equity interest in the Firm upon being named a proprietary partner. Her compensation was predicated in substantial measure on the Firm's profits,[6] and she would have been liable had the Firm sustained losses. In the ensuing months, she made substantial capital contributions to the Firm. She also received very generous fringe benefits, e.g., a car allowance in excess of $10,000 per annum and a discretionary expense allowance of $16,400 yearly. These benefits were comparable to those received by the other proprietary partners, but more extravagant than the benefits available to junior partners and associates.

The picture is only slightly less clear as to the management prong of the test. As a proprietary partner, the

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[6] Whereas associates in the Firm received fixed compensation (plus an occasional bonus based on performance), all partners (senior and junior) received a base salary supplemented by a share of the Firm's profits paid out periodically in proportion to each partner's allotment of PDUs. For example, when the appellant first ascended to proprietary partnership, her overall compensation was composed of a base salary ($60,183 per annum) plus a share of the firm's profits (amounting to approximately $30,000 during her first year as a proprietary partner). Her total compensation was pegged to 75% of what the four name partners received (resulting in gross remuneration appreciably higher than that earned by any non-proprietary partner). Her percentage allocation increased steadily during the period that followed, so that, at the time the Firm dissolved in 1992, her total compensation equalled 92% of the total compensation paid to each of the name partners.

appellant participated meaningfully in the Firm's governance. Unlike non-proprietary partners (who were allowed to attend Board of Partners' meetings but could vote only on matters affecting their own interests), proprietary partners were guaranteed a vote in all matters brought before the Board. The partnership agreement describes this tribunal as "the highest policy and decision making body of the Firm." Furthermore, the appellant's vote had added significance: if an impasse developed between a majority of the Board and 4/5ths of the proprietary partners, the decision of the proprietary partners controlled. While the appellant belittles Board membership, voting status in a law firm's highest decisionmaking body is no small thing. The fact that the membership consisted of roughly half the lawyers in the Firm dilutes, but does not dispel, the significance of such membership.[7]

Serapión's involvement in management went well beyond membership in the Board of Partners. She served as one of five voting members of the Executive Committee, which managed the Firm's day-to-day operations and regularly decided matters relating to salaries, finances, fee schedules, office space, employee performance, recruitment, admission of new partners, acceptance of business, work assignments, and the staffing of cases. In a period of about two years, the appellant attended no fewer than sixteen of these meetings and wrote up the minutes. A review of Serapión's handiwork shows her to have been a robust participant in important policy decisions; for example, the minutes reflect that she made several motions anent the admission of new partners. The Executive Committee was the nerve center of the Firm. The appellant's membership on it, coupled with her degree of involvement in management generally, strongly suggests that she was not an employee. So, too, does the fact

[7] We take judicial notice of the fact that many law firms have partner/associate ratios near one-to-one, yet few lawyers working for these firms would deny that the partners enjoy a status fundamentally different from that of the associates.

that she had authority to act as an agent for the Firm and its partners; one manifestation of this authority was that, after she became a senior partner, the Firm empowered her to sign checks drawn on its accounts.

The appellant does not go gently into this dark night. For the most part, she strives to refocus our attention on the ways she possessed less power than the four name partners. She complains that her name was never added to the Firm's name; that neither her compensation nor her equity interest ever equalled that of the name partners; that she had less authority to assign matters within the Firm; and that she did not head any of the Firm's departments. But this constellation of complaints assumes that all partners except those equivalent in stature and authority to the most powerful partners of a law firm are employees for Title VII purposes. The assumption lacks any solid legal underpinning. A person with the requisite attributes of proprietary status is properly considered a proprietor, not an employee, regardless of the fact that others in the firm may wield more power. *See Fountain,* 925 F.2d at 1401.

The appellant also makes a closely related argument, noting that she rarely got her way on disputed matters and that she dissented from many decisions.[8] But focusing on the fact that her views sometimes did not prevail confuses participation with control. Insofar as the management prong of the test is concerned, the hallmarks of proprietary status are the right to participate in decision-making and the right to have a meaningful say in governance. With the structure of any organization, certain

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[8] It is disingenuous for the appellant to focus on the number of recorded votes taken by the Executive Committee as proof of her alleged powerlessness, especially since the minutes of those meetings indicate that the vast majority of policy decisions were reached by consensus. General agreement on a matter is certainly tantamount to a vote, and it cannot be gainsaid that numerous policy decisions were made, often by unanimous consent, during the time the appellant was a member of the Executive Committee.

individuals tend to dominate others, and the dominators' viewpoints will more often be adopted. *See id.* This phenomenon often occurs among equals (Adams reportedly wrote to Jefferson on November 12, 1813, describing Dickinson as "primus inter pares, the bellwether, the leader of the aristocratical flock") and, in all events, the exercise of hegemony by one partner does not automatically dislodge others in the hierarchy from proprietary status. Elsewise, all the partners in a law firm or an accounting practice, save only the managing partner(s), would be treated as employees for Title VII purposes regardless of the extent of their ownership or the correlation between their remuneration and the entity's profits. The law is to the contrary: it is not a necessary corollary of proprietary status that the views of the partner in question will always—or even usually—prevail.

In this case, all roads lead to Rome. The evidence is uncontradicted that the appellant had an ownership interest in the Firm; that her compensation depended substantially on the Firm's fortunes; and that she enjoyed significant voting rights in the Firm's two principal governing bodies. Given these undisputed facts, no reasonable factfinder could conclude that Margarita Serapión was other than a bona fide equity partner, and, as such, a person ineligible to claim the protection which Title VII reserves for those who are employees. Consequently, the district court did not err in granting summary judgment in the defendants favor on the Title VII claim.[9]

VII. THE IDENTITY OF THE DEFENDANTS

Before closing, we note a procedural anomaly. For reasons best known to her, the appellant elected to sue three of her former partners and their fledgling partner-

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[9] Because this ground is dispositive of the federal claim, we take no view of the district court's alternative holding that Serapión failed to make out a prima facie case of gender-based discrimination.

ship, but not the Firm. The tactic raises questions about whether the new partnership can be held liable as a successor to the Firm and whether law partners can be held individually liable as "employers" under Title VII. The last question, in particular, is potentially difficult. *Compare Tomka* v. *Seiler Corp.*, 66 F.3d 1295, 1314-17 (2d Cir. 1995) (dismissing the possibility of individual liability under Title VII) *with Kauffman* v. *Allied Signal, Inc.*, 970 F.2d 178, 184-85 (6th Cir. 1992) (suggesting that individual liability exists). This circuit has not resolved the issue. *See Scarfo* v. *Cabletron Sys., Inc.*, 54 F.3d 931, 951-52 (1st Cir. 1995) (leaving the question open).

We need not enter this thicket today. It is crystal clear that the liability (if any) of the individual defendants and the new partnership cannot possibly exceed that of the actual employer. Because Serapión was not an employee, her suit cannot proceed under Title VII against any of the individual defendants or against the new partnership.

VIII. CONCLUSION

We need go no further. Once it had determined that the federal claim could not go forward, the district court had substantial discretion under 28 U.S.C. § 1367(c)(3) (1994) either to retain or to relinquish jurisdiction over the supplemental claim which the appellant had brought under local law. *See, e.g., McIntosh* v. *Antonino*, 71 F.3d 29, 33 n.3 (1st Cir. 1995); *Rodriguez* v. *Doral Mortgage Corp.*, 57 F.3d 1168, 1176-77 (1st Cir. 1995). In this instance, the court's decision to refrain from exercising jurisdiction was well within the encincture of its discretion.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 93-1790(SEC)
Title VII

MARGARITA SERAPION,
Plaintiff

v.

FRED H. MARTINEZ, *et al.*,
Defendants

OPINION AND ORDER

Pending before the Court is defendants' "Second Motion for Summary Judgment" (Docket #48). Plaintiff, Margarita Serapión, has filed a Title VII complaint against Fred H. Martínez, Lawrence Odell and Josè Luis Calabria —partners at the law firm of Martinez, Odell & Calabria ("MOC")—in which she alleges that, while a partner at the firm,[1] she was denied the right to achieve full partnership on account of her gender.[2] She further contends that she has a state law claim under Act 100, 29 L.P.R.A. § 146, and requests that the Court assume pendent jurisdiction as to that claim.

Defendants filed a motion for summary judgment on July 13, 1993. Essentially, they argued that, since plaintiff was a partner at the firm, she was not an "employee"

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[1] The firm was then known as Martinez, Odell, Calabria & Sierra ("MOCS").

[2] Also sued were the partners' wives and the firm of MOC.

for purposes of Title VII of the Civil Rights Act, 41 U.S.C. § 2000(e). Chief Judge Cerezo, who was presiding over the case at the time, denied the motion on the ground that there were genuine issues of material fact and questions of credibility which were not suitable for summary judgment. A year and a half later, having completed discovery and further examined all pertinent evidence, defendants filed a second motion for summary judgment based, *inter alia*, on the following grounds: (1) that plaintiff was exempted from coverage as an employee under Title VII because she was a proprietary partner at MOCS and a member of its Executive Committee and Board of Partners; (2) that plaintiff could not establish a *prima facie* case of discrimination under Title VII; (3) that neither the individual defendants, Fred Martínez, Lawrence Odell, José Luis Calabria, nor their respective spouses could be held liable under Title VII inasmuch as they could not be deemed plaintiff's employers; and (4) that this Court should decline to exercise supplemental jurisdiction.

Defendants submitted a Rule 311.12 Statement of Uncontested Facts and forty-six exhibits in support of the motion, which was duly opposed. On April 16, 1996, defendants further submitted a comparison and analysis of plaintiff's Response to Defendants' Rule 311.12 Statement of Uncontested Facts. Having reviewed all the motions, memoranda and exhibits submitted by the parties, the Court GRANTS defendants' second motion for summary judgment (Docket #48) for the reasons stated below.

THE FACTS

On or about September of 1979, co-defendants Martínez, Odell and Calabria joined Antonio J. Colorado and Ralph Sierra to establish a partnership for the practice of law, under the name of Colorado, Martínez, Odell, Calabria & Sierra ("CMOCS"). Shortly thereafter, Colorado

extended plaintiff, a recent graduate from the University of Puerto Rico Law School, an offer to join the firm as an associate. Nevertheless, in August of 1983, plaintiff resigned from her employment as an associate with CMOCS tojoin the Puerto Rico Treasury Department as Assistant Secretary for Internal Revenue and Collections, a position which she held until March of 1985. Docket #61, Plaintiff's Rule 311 Statement of Uncontested Facts, Exhibit 1, at 2. Upon completion of her tenure, plaintiff accepted Odell's offer to rejoin the firm as a senior associate in the firm's Tax Department.[3] Docket #61, Exhibit 1, at 2. Her initial compensation package included benefits such as paid life insurance, pension plan accruals, payment for half the cost of the medical plan, a $2,000.00 expense allocation for seminars, and participation in the annual law firm outing. Plaintiff became the first associate ever to receive a car allowance. Her compensation was also higher than that received by any other male or female associate, except for then senior associate Graciela Belaval, who had ten years of experiences as a litigation attorney. Docket #48, Defendants' Rule 311.12 Statement of Uncontested Facts, at 1-3.

A year and a half after she was rehired as an associate, plaintiff was promoted to junior partner, as a result of which her compensation package increased further. Unlike her predecessors, plaintiff was not required to invest in the law firm in order to become a junior partner. Docket #48, Statement of Uncontested Facts, at 4-5. In May of 1989, while still a junior partner, plaintiff married a fellow attorney at the firm's Tax Department, Mr. John Belk. She did not disclose this fact to the senior partners, or to anyone else at the firm. Docket #61, at 14.

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[3] By that time, Colorado had left the firm to work in the Government, and the firm had reorganized under the name of Martinez, Odell, Calabria & Sierra.

Shortly thereafter, on January of 1990, plaintiff became the only person ever to be promoted to proprietary partner from within the firm. Once again, she was spared the requirement of having to contribute to the firm's capital. The other partners each ceded her one percent (1%) of their equity participation in the firm, for a total equity participation of 4%. Docket #61, Exhibit 1, at 4. Upon her promotion, plaintiff became entitled to the fifth vote in the firm's Executive Committee and actively participated in most of the Committee's regular meetings. Docket #48, Statement of Uncontested Facts, at 5-7.

Plaintiff's phase-in period toward full participation in the firm's profits was discussed at an Executive Committee meeting held on December 8, 1990. It was finally decided that "Ms. Serapión's parity with all other Proprietary Partners would be phased in during a period of three years from her admission as Proprietary Partner," and that "[a]t the end of the three year period she would be at parity with respect to compensation, distributions, units, and any other form of compensation to which the four other Proprietary Partners are entitled." Docket #48, Exhibit 6, at 58.

Plaintiff's salary upon becoming proprietary partner was raised to $60,183.00, with an expense allocation of $16,400.00, a car allowance of $10,800.00 a year, and bonuses in the amount of $42,050.00 during the first year of partnership. Her compensation package was fixed at seventy-five percent (75%) of that of the four senior proprietary partners. Docket #61, Exhibit 1, at 4. Thereafter, she received wage increases which placed her total compensation at the dissolution of the firm in 1992 at ninety-two percent (92%) of the compensation of the remaining senior proprietary partners. Docket #48, Statement of Uncontested Facts, at 9.

The partnership agreement under which MOCS operated from its inception required a vote of four out of five

of the proprietary partners for any decision affecting the firm. That gave plaintiff twenty percent (20%) of the voting power, a power which, according to the documentary evidence submitted by defendants, she exercised in matters like (1) the election of junior partners;[4] (2) performance evaluations; (3) work assignments; (4) the recruitment of additional counsel; (5) setting the firm's policy; (6) the engagement of experts; (7) profit distribution; (8) the promotion of associates; (9) the execution of amended partnership contracts; (10) the disciplining of employees; (11) the exercise of control over the firm's finances; (12) the approval of benefits to junior partners; (13) serving as signatory to the firm's bank accounts; (14) determining litigation strategies; (15) increasing the professional fees charged by the firm; (16) quality control; and (17) negotiations as to office space and relocation. Docket #48, Statement of Uncontested Facts, at 13-26.

As early as 1984, plaintiff's fellow tax partner and head of the Tax Department, Ralph Sierra, began experiencing serious professional differences with senior partners Martínez, Odell and Calabria. On two occasions, Sierra suggested that Martínez cease to appear as the first-named partner. Docket #48, Exhibit 11. In an internal memorandum dated January 17, 1989, Sierra stated that he would no longer accept responsibility for any engagements as to which Martínez had overall client responsibility. Docket #48, Exhibit 29. He also expressed his intention to "openly seek alternative professional opportunities outside the Firm". *Id.* During the month of May, 1989, Sierra stopped going to the office altogether, and communicated with the firm only by telephone or fax. Docket #48, Statement of Uncontested Facts, at 28-29. Finally,

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[4] Plaintiff's exercise of this particular right included her participation in the promotion of her husband, John Belk, to the position of Junior Partner. See Minutes of Extraordinary Meeting of Board of Partners, Docket 48, Exhibit 15, at 1.

in a memo he wrote on January 14, 1992, he included Calabria's retirement as an issue to be discussed in their executive committee meeting, although Calabria was not interested in retirement at that point. *Id.* at 32.

Calabria reacted to the ongoing controversy with a memorandum to all proprietary partners, in which he asked them to try to avoid the "nightmarish ordeal of dissolving a firm the size of ours." Docket #48, Exhibit 30. As a possible solution to these internecine disputes, Martínez subsequently suggested the possibility of recruiting a Senior Tax Partner that did not respond to Mr. Sierra. Docket #48, Statement of Uncontested Facts, at 31.

Plaintiff backed Sierra on all of the preceding partnership disputes, a fact which often led to an impasse in the Executive Committee's decision-making processes. For instance, on March 20, 1992, Odell addressed a memorandum to all partners, in which he expressed his desire to restructure the firm. Plaintiff coalesced with Sierra in order to defeat this motion. *Id.* at 31.

Given the stalemate which the forgoing polarization of the firm retain the services of a management consulting firm to review its problems. The other proprietary partners agreed, and Hildebrandt, Inc. was retained to conduct an evaluation of the problems affecting the firm, and to make recommendations thereafter. *Id.* at 32. Based on the research which they performed, the consultants concluded that the firm's most pressing problem was one of control, not compensation. *Id.* at 33. They based their conclusion on interviews where, for example, Sierra admitted that his main problem had to do with Martínez's quest for power; and plaintiff admitted that Martínez wanted power and MOCS into two factions provoked, Sierra suggested that control, and wished to get rid of Sierra. The consultants further noted that the two factions which developed among the proprietary partners, namely, plaintiff and Sierra on one side, and Martínez, Odell and Calabria on the other,

together with the four-out-of-five majority voting rule, made it very difficult to make any significant decisions in the firm. Therefore, they recommended that this rule be dispensed with. *Id.* at 33-34.

On April 29, 1992 Sierra and plaintiff received a written ultimatum from the remaining partners, asking them to accept certain proposed changes to the partnership agreement or face the dissolution of the firm. Docket #48, Exhibit 36. Sierra and Serapión responded to the resolution by demanding the arbitration of the dispute pursuant to the terms of the contract. Docket #48, Exhibit 37. Martínez, Odell and Calabria took the request for arbitration as a rejection of their formal proposal and decided to end their partnership with Sierra and plaintiff and establish a new partnership among the three of them, which they did on May 1, 1992.[5] Docket #48, Statement of Uncontested Facts, at 40. The remaining tax partners, plaintiff's husband, John Belk, and Magaly Cobián, were also excluded from the new partnership. *Id.* On May 7, 1992, plaintiff and Sierra responded by forming a new partnership with the other tax partners, under the name of Sierra and Serapión. *Id.* at 41.

Summary Judgment Standard

As noted by the First Circuit,

> [s]ummary judgment has a special niche in civil litigation. Its role is 'to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required.' *Wynne v. Tufts University School of Medicine*, 976 F.2d 791, 794 (1st Cir. 1992), *cert. denied*, 113 S.Ct. 1845 (1993). The device allows courts and litigants to avoid full-blown trials in unwinnable cases, thus

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[5] Thus, the firm was again, reorganized to become Martínez, Odell & Calabria, as the firm is currently known.

> conserving the parties' time and money and permitting courts to husband scarce judicial resources.

McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995).

According to Fed. R. Civ. P. 56(c), a summary judgment motion should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See also *NASCO, Inc. v. Public Storage, Inc.*, 29 F.3d 28 (1st Cir. 1994). It is not enough to conjure up an alleged factual dispute between the parties; to defeat summary judgment, there must exist a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

For a dispute to be "genuine," there must be sufficient evidence to permit a reasonable trier of fact to resolve the issue in favor of the non-moving party. *U.S. v. One Parcel of Real Property*, 960 F.2d 200, 204 (1st Cir. 1992). See also, *Boston Athletic Assn. v. Sullivan*, 867 F.2d 22, 24 (1st Cir. 1989). By like token, "material" means that the fact is one that might affect the outcome of the suit under the governing law. *Morris v. Government Development Bank of Puerto Rico*, 27 F.3d 746, 748 (1st Cir. 1994).

Recent case law has also established that "summary judgment may be appropriate '[e]ven in cases where elusive concepts such as motive or intent are at issue . . . if the non-moving party rests merely upon conclusory allegations, improbable inferences and unsupported speculation'." *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 259 (1st Cir. 1994) (quoting *Medina-Muñoz v. R.J. Reynolds Tobacco, Co.*, 896 F.2d 5, 8 (1st Cir. 1990)).

In determining whether to grant summary judgment, the Court may not, however, weigh the evidence. *Casas Office*

Machines, Inc. v. Mita Copystar America, Inc., 42 F.3d 668 (1st Cir. 1994). Summary judgment "admits of no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails." Id. (citing *Greenburg v. Puerto Rico Maritime Shipping Authority*, 835 F.2d 932, 936 (1st Cir. 1987)). Accordingly, if the facts permit more than one reasonable inference, the court on summary judgment may not adopt the inference least favorable to the non-moving party. *Casas Office Machines*, 42 F.3d at 684.

APPLICABLE LAW/ANALYSIS

I. Effect of plaintiff's status as partner under Title VII

It has long been undisputed that "[w]hile employees of a partnership are protected under Title VII, the partners themselves are not." 4 Cook & Sobieski, Jr. *Civil Rights Actions* ¶ 21.08[E] (1994). In *Hishon v. King & Spalding*, 467 U.S. 69 (1984), for example, the Supreme Court upheld a female associate's Title VII cause of action against her firm's partners for their failure to name her partner, as promised when she became an associate. Finding that under the particular facts of the case, consideration for partnership was a term and condition of her employment as an associate, the Court held that Title VII protected the associate's contractual right to be considered for a partnership. *Id.* at 76. In a concurring opinion, however, Justice Powell noted that:

> the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its associates.

Id. at 79. Federal courts have extensively cited Justice Powell's concuring opinion in *Hishon* to sustain the holding that "the benefits of antidiscrimination statutes . . . do not extend to those who properly are classified as partners." *Hyland v. New Raven Radiology Associates*, 794 F.2d 793, 797 (2nd Cir. 1986).

After *Hishon*, the Equal Employment Opportunity Commission exercised its mandate to interpret and enforce Title VII and issued a decision finding that partners in a law firm could not be classified as employees for purposes of Title VII. *See* EEOC decision No. 85-4, Emp. Prac. Guide (CCH) para. 6840, at 7040 (Mar. 18, 1985). More importantly, the EEOC established that "[i]n determining whether the individual is a partner or an employee in a particular case, the Commission will consider several factors including, but not limited to, the individual's ability to control and operate the business and to determine compensation and the administration of profits and losses." *Id.* at 7041 n. 4.

Those federal courts which have had the opportunity to address the applicability of Title VII to partnerships in general have similarly concluded that while employees of a partnership are protected by Title VII, the partners themselves are not. See, e.g. *Burke v. Friedman*, 556 F. 2d 867 (7th Cir. 1977); *Wheeler v. Hurdman*, 825 F. 2d 257 (10th Cir. 1987); and *Fountain v. Metcalf, Zima & Co., PA.*, 925 F. 2d 1398 (11th Cir. 1991) (within the scope of ADEA). It is evident from these, as well as other opinion, that the factors for determining one's status as a partner under Title VII remain the same regardless of the type of business or partnership involved.

In *Burke*, for example, the Seventh Circuit held that when a partner participates in the administration and control of the business and shares in the profits and losses, he or she cannot be regarded as an employee, but rather as an employer who owns and manages the operation of the business. 556 F.2d at 869. Similarly, in *Wheeler*,

plaintiff's status changed from that of employee to partner. After considering plaintiff's powers and duties, the court held that Ms. Wheeler was not an employee under the definition of Title VII and was thus not entitled to coverage under the Act. When assessing Ms. Wheeler's status as an employer, the court stated as follows:

> Wheeler's circumstances as partner are portrayed as undistinguishable from her prior employee status. Yet, they are distingiushable and substantially so. Her participation in profits and losses, exposure to liability, investment in the firm, partial ownership of firm assets, and her voting rights—plus her position under the partnership agreement and partnership laws—clearly place her in a different economic and legal category. Evidence of that conclusion is found in the fact that only a small percentage of Main Hurdman personnel were admitted to the partnership.

825 F.2d at 267. Finally, in *Fountain v. Metcalf*, the plaintiff, a partner at defendants' accounting firm, filed an age discrimination claim under ADEA against his former partners. In holding that the plaintiff was an employer, the Court explained that:

> [i]t is undisputed that, unlike the firm's employees, Fountain: shared in the firm's profits, losses, and expenses; was compensated on the basis of a share in the firm's profits; was liable for certain debts, obligations, and liabilities of the firm; and had a right to vote his thirty-one percent ownership on member/shareholders' amendments to the agreement, on admission of new member/shareholders, on termination of relationship with member/shareholders, on draws, and on distribution of profits and income. Those facts are virtually a textbook listing of the management, control and ownership factors that establish Fountain's role as that of partner, not employee.

Fountain, supra, at 1401.

The uncontested facts in the instant case seem strikingly similar to those in the forgoing cases. Plaintiff's ascent to full partnership did involve significant changes in her status at the firm: (1) she participated in the administration and control of the firm; (2) she had a share —albeit a small one—in the firm's profits and losses; (3) despite the fact that she made no equity contribution to the firm, her compensation at the time the partnership was dissolved was 92% of that of the senior partners; and (4) her voting rights were undisputed—in fact, it was precisely her voting power as proprietary partner which rendered the other partners unable to make any significant changes in the partnership agreement and forced them to resort to a management consulting firm to address their problems.

The functions, powers and characteristics of her position were therefore, those which are typically exercised by partners. See *Burke*, 556 F.2d at 869; *Wheeler*, 825 F.2d at 267; *Fountain*, 925 F.2d at 1401. As such, she cannot be considered an "employee' under the provisions of the statute.

II. Existence of a prima facie case of discrimination under Title VII

Assuming, *arguendo*, that her partnership status could not be established from the undisputed facts and documentary evidence which the parties submitted, plaintiff's Title VII action would still not withstand a close analysis on the merits.

It is well settled that, in disparate treatment actions, a Title VII plaintiff bears the ultimate burden of proving that she was a the victim of intentional discrimination. *Udo v. Tomes*, 54 F. 3d 9, 12 (1st Cir. 1995); *Woodman v. Haemonetics Corp.*, 51 F. 3d 1087, 1091 (1st Cir. 1995); *St. Mary's Honor Center. v. Hicks*, 113 S. Ct. 2742, 2747-8 (1993). Title VII "does not grant relief to a plaintiff who has been discharged unfairly, even by

the most irrational of managers, unless the facts and circumstances indicate that discriminatory animus was the reason for the decision." *Udo v. Tomes*, 54 F. 3d at 13, quoting *Smith v. Stratus Computer, Inc.*, 40 F. 3d 11, 16 (1st Cir. 1994).

In order to prove that she was a victim of intentional discrimination, "[a] disparate treatment claimant bears the burden of proving that she was subjected to different treatment than persons similarly situated 'in all relevant aspects' . . . ., [i.e.], in terms of performance, qualifications and conduct." *Byrd v. Ronayne*, 61 F. 3d 1026 (1st Cir. 1995). Should the claimant be unable to offer direct proof of a discriminatory animus, the burden of producing evidence will be allocated "according to the now-familiar three step framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973)." *Udo*, 54 F. 3d at 12. See also *Ayala Gerena v. Bristol Myers-Squibb Co.*, slip op. 95-1867 (1st Cir. September 5, 1996); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In other words, the claimant will first have to:

> make a prima facie showing of discrimination, established by proving: (I) that plaintiff is a member of a protected class; (ii) that plaintiff performed his or her job satisfactorily; (iii) that plaintiff was discharged; and (iv) that plaintiff's position remained open and was eventually filled by persons with plaintiff's qualifications. A plaintiff's successful production of a prima facie case creates a presumption of discrimination.

Ayala-Gerena, slip op. 95-1867, at 16 (citations omitted).

Once the plaintiff demonstrates the forgoing, the burden shifts to the defendants, who must produce sufficient evidence to rebut plaintiff's prima facie case. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). If the defendants satisfy this requirement, the burden once again rests upon the plaintiff, who must introduce sufficient evidence to support two findings: (1) that the employ-

er's articulated reason for terminating the plaintiff is a pretext, and (2) that the true reason for such dismissal was intentional discrimination. *Udo*, 54 F. 3d at 13; *Smith*, 40 F. 3d at 16. Plaintiff must "elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive: [gender] discrimination." *Mesnick v. General Electric Co.*, 950 F. 2d 816, 823 (1st Cir. 1991).

Plaintiff has failed to present direct evidence of her alleged gender discrimination. She has, in fact, consistently acknowledged that, upon joining MOCS, she received favorable treatment from the firm's partners. She admitted, for example, (1) that she was the first and only attorney to be offered a proprietary partnership under which she would eventually—within three years—achieve full parity with all the other proprietary partners; (2) that she was dispensed from making the capital contribution required in the partnership agreement; and (3) that she was afforded such benefits even though she had not brought any clients to the firm. As the First Circuit recently affirmed, "[w]hile perhaps probative of discrimination, stray remarks do not satisfy a plaintiff's burden of proving discrimination by direct evidence.' *Ayala-Gerena*, slip op., 95-1867, at 17 (citations omitted). The *McDonnell Douglas* burden shifting framework must, therefore, come into play.

Although plaintiff obviously engaged in protected conduct and may have suffered an adverse employment action, she has failed to demonstrate a causal connection between these two facts. Again, such stray remarks as plaintiff quite ably introduced in order to render this claim more colorable "lack the necessary link between the alleged speaker's discriminatory remark and the adverse employment decision." *Ayala-Gerena*, slip op., 95-1867, at 18. It is, in fact, undisputed that upon the dissolution of MOCS, none of the Tax Department attorneys—men

or women—were extended offers to join the new law firm, except for a female associate, Brunilda Rodriguez. There is therefore, no evidence that defendants retained or treated similarly situated persons who are not within her protected class more favorably. *Byrd*, 94-1810, at 9, 14; *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836; 842 (1st Cir. 1993); *Connell v. Bank of Boston*, 924 F.2d 1169, 1172 (1st Cir. 1991); *Medina Muñoz v. R. J. Reynolds Tobacco, Co.*, 896 F.2d 5, 8-9 (1st Cir. 1990).

Plaintiff argues that defendants never intended that she achieve full partnership, and extended her partnership status so as to retain her in the firm due to her high productivity. She supports the forgoing with a sworn statement from her former and current patner, Ralph Sierra, stating that the proposed partnership agreement which defendants submitted would have (I) lowered plaintiff's compensation; (ii) prevented her from achieving full parity with the other partners, and (iii) denied her job security. Docket #61, Plaintiff's Rule 311 Statement of Contested and Uncontested Facts, Exhibit 2.

In addition, plaintiff makes reference to a judgment from the Puerto Rico Superior Court, San Juan Section, in a related discrimination case brought by her husband, John Belk, in which the judge made findings of fact concluding that (I) defendants were prejudiced against married couples in the firm; Docket #61, Exhibit 6, at 9; (ii) defendants' mistrust of plaintiff had to do with their feeling that she had been dishonest with them by concealing her marriage with an associate; *Id.* at 15, 20; and that (iii) the trust which should prevail among proprietary partners did not exist. *Id.* at 23.

Assuming, for the sake of argument, that such statements are true, they merely demonstrate that defendants treated plaintiff differently because of the distrust which resulted from her undisclosed marriage to John Belk. Yet this distrust may have been partly triggered by the fact that, while a proprietary partner, plaintiff participated in

matters pertaining to her husband's ascent in the law firm. See Docket #48, Exhibit 15. Therefore, the forgoing facts, alone, are insufficient to demonstrate that the reason for such discrimination was that she was a woman.

Defendants have also established that they had a legitimate reason to terminate plaintiff's employment. The evidence which they presented demonstrates that the dissolution of the former law firm of MOCS was motivated by irreconcilable differences and a power struggle between two factions of proprietary partners at the law firm: the partners of the Tax Department, i.e. plaintiff and Ralph Sierra, Jr. on one side; and Fred Martínez, Lawrence Odell and José Calabria on the other.

While the particular details of every internal dispute between the two factions might never be entirely clear, one thing is undisputable: that defendants' decision to dissolve their partnership was rendered on a gender-neutral basis. The power struggle between the two factions of partners, and the adverse reaction to plaintiff's undisclosed marriage to a subordinate, had nothing to do with her gender, or with defendants' desire to prevent her from achieving full parity with the senior partners on account of her gender. One cannot seriously posit that a flourishing law firm which, for years, struggled through internecine partnership disputes and made genuine efforts to prevent the firm's dissolution, would finally decide to split in order to prevent plantiff from obtaining what was promised her. It seems clear that defendants would have arrived to the same result regardless of her gender.

Plaintiff has failed to demonstrate the existence of a gender-based disparate treatment under Title VII. Since she had the burden of establishing intentional discrimination and was unable to do so, summary judgment is warranted.

III. Individual liability of co-defendant partners Martínez, Odell and Calabria under Title VII.

Defendants argue that plaintiff's suit is without merit because partners, as agents, cannot be held individually liable under Title VII, and plaintiff failed to sue the only defendant which could arguably be held responsible: her former law firm of MOCS. In support of their statement, they cite recent federal court decisions which have, directly or indirectly, exempted an employers' agent from individual liability under Title VII. See, e.g. *Miller v. Maxwell's Intern, Inc.*, 991 F. 2d 583, 587-8 (9th Cir. 1993); *Grant v. Lone Star Co.*, 21 F. 3d 649, 651-3 (5th Cir. 1994); *Smith v. Lomax*, 45 F. 3d 402, 403-5 (11th Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F. 3d 507 (4th Cir. 1994); *U.S. E.E.O.C. v. AIC Sec. Investigations Ltd.*, 55 F. 3d 1276 (7th Cir. 1995); *Ball v. Renner*, 54 F. 3d 664 (10th Cir. 1995); *Dirksen v. City of Springfied*, 842 F. Supp. 1117, 1122-4 (C.D.Ill. 1994); *Johnson v. Northern Indiana Public Service Co.*, 844 F. Supp. 466, 468-71 (N.D. Ind. 1944); *Lowry v. Clark*, 843 F. Supp. 228, 229-31 (E.D. Ky. 1994); *Smith v. Capitol City Club of Montgomery*, 850 F. Supp. 976 (M.D. Ala. 1994); *Crawford v. West Jersey Health Systems*, 847 F. Supp. 1232 (D.N.J. 1994);*Caplan v. Fellheimer Eichen Braverman & Kaskey*, 882 F. Supp. 1529, 1531 (E.D.Pa. 1995); *Flamand v. American Intern. Group, Inc.*, 876 F. Supp. 356, 363 (D.P.R. 1994).

Alternatively, defendants contend that since plaintiff never had an employment relationship with MOC, MOCS was an indispensable party which plaintiff had to include as a defendant in the complaint. In addition, defendants argue that even if MOC was a successor employer, it could not be held liable under Title VII, since plaintiff did not comply with the notice, continuity and solvency requirements of *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1236 (7th Cir. 1986).

In response, plaintiff asserts that defendants' interpretation of the forgoing individual liability jurisprudence is in no way conclusive. Through cases such as *Ruich v. Ruff, Weidenaar & Reidy, Ltd.*, 837 F. Supp. 881 (N.D. Ill. 1993) (where a district court stated that "the courts that have ruled on personal liability under Title VII have considered whether the 'agent' is liable as an 'employer,' . . . [whereas a partner is] not an agent but . . . the employer himself"), 837 F.Supp. at 884; and *Janopoulos v. Harvey L. Walner & Assocs., Ltd.*, 835 F.Supp. 459 (N.D. Ill. 1993) (where the court held that the owner of a professional corporation was an alter ego of the corporation and was thus an "employer" for the purposes of liability under Title VII), plaintiff attempts to demonstrate that there is, at best, a conflict among the circuits regarding this issue.

As to defendants' assertions regarding MOC's successor employer liability, plaintiff argues that she could not possibly have sued MOCS because its assets had already been liquidated. More importantly, she contends that since she is suing for damages, defendant MOC and MOCS would be joint tortfeasors. Thus, plaintiff contends that she was under no obligation to bring MOCS to the present action. *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Intern, Inc.*, 982 F.2d 686 (1st Cir. 1993) ("it is not necessary for all joint tortfeasors to be named as defendants in a single law suit"). *Id.* at 691. Plaintiff further avers that she could not have complied with the notice requirement since the dissolution of MOCS and creation of MOCS occurred almost simultaneously; and that the continuity and solvency requirements are met in this case, since MOC kept MOCS' clients, staff, records and physical address, among other things.

Although it is unclear whether the partners and their spouses in the instant case could escape liability as individual employers, we need not address the issue at this

point, since, as stated above, plaintiff does not comply with the other requirements which are needed to establish a Title VII gender discrimination case. For similar reasons, we need not proceed to analyze whether MOC is a succesor employer subject to Title VII liability.

IV. Pendent jurisdiction claims

It is hornbook law that a district court has discretion to exercise supplemental jurisdiction over the state law claims where the state and federal claims derive from a common nucleus of operative facts. *See,* 28 U.S.C. sec. 1367; *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 725 (1966). Nevertheless, where, as here, all federal claims warrant dismissal pior to trial, the district court should decline to exercise supplemental jurisdiction.

It has been stated that the holding in *Gibbs* "seems clearly to require dismissal without action on the merits and without any exercise of discretion if all the federal claims . . . are found to be short of trial, deficient." *Snowden v. Millinocket Regional Hosp.* 727 F. Supp. 701, 709 (D. Me. 1990). Such a result is warranted in view that "[t]he power of a federal court to hear and to determine state-law claims in non-diversity cases depends upon the presence of at least one 'substantial' federal claim in the lawsuit'. *Newman v. Burgin,* 930 F. 2d 955, 963 (1st Cir. 1991).

Although District Courts are not obligated to dismiss pendent state law claims, in the usual case in which all federal-law claims are dismissed before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state law claims. In such a case, state-law claims should be dismissed. *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 350 n. 5 (1988); citing *Gibbs,* 383 U.S. at 726-727; see *Mercado-Garcia v. Ponce Federal Bank,* 979 F.2d 890, 896 (1st Cir. 1992); *Rivera v. Murphy,* 979 F.2d 259, 264 (1st. Cir. 1992);

Figueroa Ruiz v. Alegria, 896 F.2d 646 (1st Cir. 1990); *cf. Vega v. Kodak Caribbean*, 3 F.3d 476, 478 (1st. Cir. 1993) (holding that "when the district court disposed of the ADEA claims, the pendent claims became subject to dismissal for want of subject matter jurisdiction"); *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 47 (1st. Cir. 1991) (stating that "since federal question jurisdiction hinged on that [dismissed] count, and there was no complete diversity of citizenship or other cognizable basis for the assertion of subject matter jurisdiction in the district court, the pendent state law claims were properly dismissed under the rule of *United Mine Workers v. Gibbs*").

Supplemental jurisdiction should be declined in this case in view that the state law claims substantially predominate over the federal claims. The Supreme Court has held that judicial economy, convenience, fairness and comity favors "a decision to relinquish jurisdiction when "state issues predominate, whether in terms of proof, of the scope of the issued raised, or the comprehensivenss of the remedy sought." *Carnegie-Mellon*, 484 U.S. at 350 n. 5, citing *Gibbs* 383 U.S. at 726. Since plaintiff is not entitled to any award under Title VII, the only award plaintiff could, in any event, pursue would be under state tort law.

In view of the above discussion, defendants' Second Motion for Summary Judgment is GRANTED (Docket #48), and plaintiff's complaint for Title VII violations is DISMISSED. We also decline to exercise jurisdiction over plaintiff's remaining state claims against the defendants. Judgment shall be entered accordingly.

SO ORDERED.

In San Juan, Puerto Rico, this 24th day of September, 1996.

/s/ Salvador E. Casellas
SALVADOR E. CASELLAS
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 96-2251

MARGARITA SERAPION,
Plaintiff-Appellant

v.

FRED H. MARTINEZ, *et al.*,
Defendants-Appellees

ORDER OF COURT

Entered: May 5, 1997

The parties are ordered to file a supplemental memorandum, not to exceed eight pages, pertaining to Puerto Rico partnership law only, no later than May 12, 1997.

By the Court:

/s/ William H. Ng
WILLIAM H. NG
Clerk

(2)

Supreme Court, U.S.
FILED
NOV 19 1997
CLERK

No. 97-682

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MARGARITA SERAPION,

Petitioner,

v.

MARTINEZ ODELL & CALABRI. *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-682

MARGARITA SERAPION,

Petitioner,

v.

MARTINEZ ODELL & CALABRIA, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Martínez Odell & Calabria, Fred H. Martínez, and the conjugal partnership composed of Fred H. Martínez and Josefina Guzmán; Lawrence Odell, and the conjugal partnership composed of Lawrence Odell and Margaret Mejía; José Luis Calabria, and the conjugal partnership composed of José Luis Calabria and Nereida Seda, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the First Circuit Court of Appeals' opinion in this case. The opinion is reported at 119 F.3d 982 (1st Cir. 1997).

Review by this Court is unwarranted, as the First Circuit correctly applied federal law in determining that Petitioner is not an employee covered by Title VII of the Civil Rights Act,

there is no substantial conflit between the Circuits, and Petitioner relies on unsubstantiated argument and representations of Puerto Rico law.

STATEMENT OF THE CASE

Introduction

The statement of the case presented by Petitioner in this Writ of Certiorari is essentially an argument which misstates both background[1] and material facts. Most importantly, Petitioner engages in erroneous legal argument. As detailed below, there is no basis for this Court's review of this factbound contention. Both the district court and the First Circuit Court of Appeals based their determination on the threshold issue of coverage upon considered analyses of the undisputed material facts.

The Petitioner misrepresents the facts in this case

Having failed to survive summary judgment because the totality of the circumstances of Petitioner's relationship with Martínez Odell Calabria & Sierra (the Firm)[2] demonstrates that she had the indicia of ownership and authority typical of proprietary partners, Petitioner now urges this Court to adopt an "entity approach" allegedly because the nature of the Firm

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[1] Petitioner embellishes when she claims that she was a full-time professor of accounting and taxes in the school of Business Administration of the University of Puerto Rico, which implies tenure. Petitioner was simply a full time instructor in those areas. Similarly, she takes full credit for the authorship of a book published for many years by her partner and mentor, Mr. Ralph Sierra Jr., who included her as co-author of the book in 1990. She is still a co-author.

[2] Petitioner did not name her alleged employer, Martínez Odell Calabria & Sierra as defendant in this case. Rather, she chose to sue the new firm created by her former partners Martínez, Odell and Calabria after the dissolution of the Firm.

under the Laws of the Commonwealth of Puerto Rico mandates the inclusion of all partners in the definition of employee under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 3000e.

Petitioner misrepresents the facts in contending that all attorneys in the firm received salaries "*...as employees, pursuant to the laws of the Commonwealth of Puerto Rico.*" That is bare argument, unsupported by the uncontroverted facts of this case, or by adequate reference to Puerto Rico law. Similarly, Petitioner's assertion that the "*sociedad*", meaning the law partnership, makes contributions to the Puerto Rico Workmen Accident Compensation Insurance Corp. and other unemployment systems on behalf of the partners, implying that such contributions are made on behalf of the proprietary partners, is a misstatement of fact totally unsupported by the footnote to the statement. Most importantly, that "fact" was not raised by Petitioner in her opposition to summary judgment. Petitioner's statement of contested material facts before the district court failed to include any evidence with respect to the facts that would support her contention that professional partnerships under the Civil Code of Puerto Rico are *de facto* professional corporations which treat all partners as employees.

THE WRIT SHOULD BE DENIED AS UNWARRANTED

I. THE FINDINGS OF THE GLASS CEILING COMMISSION AND/OR THE STATISTICS ON WOMEN AND MINORITY PARTICIPATION IN THE HIGHER ECHELONS OF THE PROFESSIONAL WORLD FAILED TO JUSTIFY BROADENING THE REMEDIAL GOALS OF TITLE VII

Petitioner's argument that the First Circuit Court of Appeals erred in ignoring the structure of the employing entity and refusing to extend coverage to Petitioner is premised on two fallacies; that a *per se* rule would be in harmony with the purposes of the Act, and that Puerto Rico partnerships are *de facto* professional corporations which requires coverage under the Act for all Firm members, regardless of partnership indicia.

Contrary to Petitioner's contention, the status of the market place for women and minorities referred to in studies as the "Glass Ceiling" does not render the issue herein one of extraordinary public importance which warrants review by this Court. As noted by this Court, the Constitution protects *persons,* not *groups*. *Adarand v. Peña*, 515 U.S.__, 132 L.Ed.2d 158, 115 S.Ct. 2097 (1995). The mere fact that Petitioner is a member of a protected group does not warrant review, particularly in the absence of evidence of prejudicial error by the Court below. Petitioner's reliance on a *per se* entity test to stretch the coverage of Title VII to her benefit is contrary to the fair application of federal law. As aptly stated by the Tenth Circuit in *Wheeler v. Hurdman*, 825 F.2 257, 275, 276 10th Cir. (1987);

> To suggest that Congress intended the provisions of Title VII, the ADEA, and the FLSA to reach all

> situations where discrimination may arise in a business setting is to suggest that it enacted these statutes with the intent that they cover all individuals having an economic relationship with a business. This would make employee status largely irrelevant and would essentially transform the employment discrimination statutes into *business* discrimination statutes. *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983). If this were the case, then we must question why Congress bothered to limit each statute's reach to employment practices. The requirement that the statutes cover only employment situations suggests that Congress perceived a need to limit the application of these statutes. *Id.*; *see* also *Hishon v. King & Spaulding*, 467 U.S. 69, 79, 104 S.Ct. 2229, 2235, 81 L.Ed.2d 59 (1984) (Powell, J., concurring).

Accordingly, the First Circuit Court of Appeals did not err in considering all the factual circumstances of Petitioner's relationship with the Firm to determine that Petitioner was not an employee covered by Title VII.

II. THE DETERMINATION OF COVERAGE UNDER TITLE VII IS AN ISSUE OF FEDERAL LAW WHICH DOES NOT PERMIT A MECHANICAL PER SE "ENTITY APPROACH"

While the different circuits have reached various results in analyzing coverage under the antidiscrimination statute, they all travel the same road of considering federal statutes, legislated history, judicial decisions and common understandings. Precisely, the court whose decisions Petitioner relies on in seeking this Court's review, the Second Circuit, has emphatically stated that no *per se* rule applies.

> Like life, the law is not that simple. In fact, decisional law makes plain that no *per se* rule has been adopted that includes all those working for a corporation as employees—regardless of the amount of their stock ownership, their lack of involvement in the day-to-day activities of the business, or their failure to perform additional employee duties. *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793, 800 (2nd Cir. 1986)

For instance, in *E.E.O.C. v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2nd Cir. 1996), while the Court relied heavily on the fact that Johnson & Higgins chose to become a corporation over a partnership, and had operated as such for nearly 100 years, it did not make a determination of employee status solely on that ground. The Court considered the operations of this worldwide organization which employed over 8,000 people at the time of the opinion. *Id.*, at 1532, 1533.

The Court, in rejecting *Johnson & Higgins's* arguments of *de facto* partnership, following *Hyland, supra,* cautioned that while the roles of directors, as in a professional corporation, and partners are mutually exclusive, that does not mean that those who own shares in a corporation may or may not be employees. The *Hyland* court did not imply, much less hold, that all directors must be viewed as employees. "Directors who do not possess the common law indicia of employment are clearly not 'employees'." *Id.*, at 1538. Thus, the Court in both *Hyland* and *Johnson & Higgings* looked to the person's role in the company to determine whether there existed an employment relationship in addition to the role of director.

In *Hyland*, the court noted that the statute of Dr. Hyland was clear, as he was specifically designated as an employee of the corporation in an employment agreement containing detailed provisions relating to the terms and conditions of his employment. *Hyland,* 794 F.2d, at 798.

Under the *E.E.O.C. v. Johnson & Higgings* rationale, which Petitioner avers as furthering her cause, Petitioner would have no redress. Precisely, the Second Circuit barred allegations of *de facto* interpretations of a juridical figure chosen by contract. Like defendant in *Johnson & Higgings,* Petitioner in the present writ suggests a *de facto* interpretation of the structure of the Firm to liken it to a professional corporation. This interpretation is contrary to the holding of *Johnson & Higgings*, and, as will be further discussed below, is erroneous as a matter of law. *Johnson & Higgings* does not stand for a *per se* coverage rule for directors in a corporation.

Even within this framework of a professional corporation, the Second Circuit addressed the common law agency test of employment and effected a broad examination of the totality of the circumstances in a three-pronged test: (1) whether the director has undertaken traditional employee duties; (2) whether the director was regularly employed by a separate entity; and (3) whether the director reported to someone higher in the hierarchy. *E.E.O.C. v. Johnson & Higgings, Inc.*, 91 F.3d, at 1539.

The Court noted particularly that, even though the Board itself was the highest authority within J & H, the individual directors, in their capacities as officers and managers, each reported to the senior members of the Board, who are responsible for their annual performance evaluations. *Id.*, at 1539, 1540. It is significant that, at no time in the long and tortuous road of this case, has the Petitioner attempted to establish that she was evaluated by anyone, most particularly

the Executive Committee or the Board of Partners, after she became a proprietary partner in January, 1990.

The Third Circuit has acknowledged that the determination of whether the Federal Antidiscrimination Laws (ADEA) protects a director of a professional corporation hinges upon the director's duties and not the title. *Sempier v. Johnson & Higgings,* 45 F.3d 724, 728 n. 4 (3d Cir.), *cert. denied,* __ U.S. __, 115 S.Ct. 2611, 132 L.Ed.2d 854 (1995).[3]

There is no split among the circuits, or inconsistency with the decisions of other circuits or those of the first circuit warranting review

None of the Circuit Courts which have reviewed the issue of employee status under Title VII of the Civil Rights Act, or the Age Discrimination in Employment Act (ADEA); the First, Second, Third, Sixth, Seventh, Eighth, Tenth and Eleventh have adopted an entity rule as proposed by Petitioner. Even the Second Circuit, which has found the choice of the corporate figure significant, has considered and analyzed the specific factual circumstances of each case to determine whether the person whose status is in issue is an employee covered by the Federal Antidiscrimination Laws.

The Sixth, Seventh, Eighth, Tenth and Eleventh Circuit Courts of Appeals have also followed a factual analysis of employee indicia in determining whether salaried officers of a partnership were employees or not. *Simpson v. Ernst &*

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[3] In an earlier case quoted by Petitioner, *Jones v. Baskin, Flaherty, Elliot & Mannino, P.C.,* 670 F.Supp. 597 (W.D. Pa. 1987), the Court simply pointed out that the fundamental structural difference between a corporation and a partnership would seem to undermine the assertion that Petitioner enjoyed the rights and prerogatives of partnership. Its determination of employee status was premised by an in depth analysis of the operations of the professional corporation.

Young, 100 F.3d 436 (6th Cir. 1996), *cert. denied,* __ U.S. __ 117 S.Ct. 1862, 137 L.Ed.2d 1062 (1997); *E.E.O.C. v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068 (6th Cir. 1982); *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977); *E.E.O.C. v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984); *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996), *cert. denied,* __ U.S. __, 117 S.Ct. 1694, 137 L.Ed.2d 821 (1997); *Wheeler v. Hurdman*, 826 F.2d 257 (10th Cir. 1987) and *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398 (11th Cir. 1991).

In *Wheeler*, the Tenth Circuit found individual partners of the partnership to be exempted, and therefore not taken into consideration for computation of the fifteen-employee minimum required for Title VII coverage. The court *quoted Burke v. Friedman, supra,* with approval stating:

> Partners manage and control the business and share in the profits and losses. *See Commissioner of Internal Revenue v. Tower*, 327 U.S. 280, 66 S.Ct. 532, 90 L.Ed. 670 (1946); *Wilson v. Commissioner of Internal Revenue,* 161 F.2d 661, 664 (7th Cir. 1947). In light of the foregoing, we do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business. *Wheeler v. Hurdman*, 826 F.2d, at 264.

In *Wheeler*, the Court applied the economic realities test to determine employee status, and found, based upon the specific factors of the work relationship, that a general partner in an accounting firm was not an employee entitled to sue under Title VII. The Court rejected the arguments of the E.E.O.C and Ms. Wheeler to the effect that all partners must be covered under the Discrimination Acts, finding said construction contrary to congressional intent. *Id.*, at 275-276.

In conclusion, none of the circuits which have considered the status of directors or partners for purposes of federal antidiscrimination law, has established a *per se* rule to include persons or exclude them from coverage. All of the circuits delve into the facts of the case to determine coverage, and the First Circuit's decision in the present case correctly or properly summarizes the material factual analysis of employee criteria. In the absence of conflict between the circuits, certiorari is not warranted.

III. NOTHING IN THE PUERTO RICO PARTNERSHIP LAWS REQUIRES THE TREATMENT OF PROPRIETARY PARTNERS AS EMPLOYEES OF THE PARTNERSHIP

Petitioner initially argued to the district court that under Puerto Rico law,[4] the concepts of partner and employee are not mutually exclusive, and therefore, a *per se* rule excluding "partners" from the protection of Title VII would have no basis in the structure of the entity under the law of Puerto Rico, and that the specific facts of the relationship with the Firm indicated she was an employee rather than a proprietary partner exempt from coverage under Title VII. Having failed to thwart summary judgment on the specific facts and circumstances of her status as a proprietary partner, Petitioner proceeded to coin a new *per se* rule which she argued before the First Circuit Court, and now before this Court: that Puerto Rico Laws require the treatment of all partners, including proprietary partners, as employees for all purposes, including the interpretation of the Federal Antidiscrimination Acts.

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[4] Petitioner's reference to the Laws of Puerto Rico is generic, failing to address the specific statutes which regulate partnerships as an artificial person.

Nothing in the provisions of the Puerto Rico Civil Code and juridical opinions interpreting the partnership concept in the context of liability toward creditors or even for tax purposes, requires that proprietary partners be treated as employees. Articles 1556-1597, Puerto Rico Civil Code 1930, (Puerto Rico Laws Ann. tit. 31, §§ 4311-4399) In fact, the word "employee" is not used once in the statutes. On the other hand, the labor laws of the Commonwealth of Puerto Rico consistently follow the statutory exclusions originally stated in the Fair Labor Standards Act and exclude among others, independent contractors and executives from their coverage.[5]

A. The Partnership laws of Puerto Rico limn the duties and responsibilities of partners toward each other and to third parties, and not their status for labor or constitutional law purposes.

While undisputedly, professional partnerships have an independent juridical personality separate and apart from that of their proprietary partners under the Civil Code, they may not be likened to corporations. The partners, unlike stockholders in a corporation, do not enjoy limited responsibility, and they are liable with their own assets where the partnership's assets are insufficient to cover the liabilities of the partnership. *Asociación de Propietarios v. Santa Bárbara Co.*, 12 P.R.Dec. 43 (1982), *Rasa Engineering Corp. v. Daubón*, 86 P.R.R. 182 (1962).

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[5] The Fair Labor Standards Act, provides in pertinent part, as follows:

> ...(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman... 29 U.S.C. §213.

The Civil Code of Puerto Rico defines a partnership as "a contract by which two or more persons bind themselves to contribute money, property or industry to a common fund, with the intention of dividing the profits among themselves." Article 1556 of the Puerto Rico Civil Code, (Puerto Rico Laws Ann. tit. 31, § 4311) This definition is substantially the same as that set forth in the Uniform Partnership Act. Section 6 of this Act, provides that absent agreement as to the form of management, the following rules apply:

> (1) All the partners shall be considered agents, and whatever any one of them may do by himself shall bind the partnership; but each one may oppose the act of the others before they may have produced any legal effect.

Both the Uniform Partnership Act and the Civil Code have similar definitions for the distribution of profits and losses. The Code states: "All partners must share in the partnership's profits and losses in the proportion agreed upon and any agreement excluding a partner from any share in the profits or losses is legally void." (Articles 1580 and 1582 of the Puerto Rico Civil Code, (Puerto Rico Laws Ann. tit. 31, §§ 4351, 4353 (1993).) The Act sets forth at Section 9:

> Every partner is an agent of the partnership for the purpose of its business, and the act of every partner including the execution in the partnership name of any instrument for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

Article 1591 of the Puerto Rico Civil Code, (Puerto Rico Laws Ann. tit. 31, § 4391), provides that the partnership may be dissolved by the natural death, civil interdiction, or insolvency of any of the partners, and in the case prescribed in section 4373, by the will of any of the partners, subject to the provisions of sections 4396 and 4398. As a general rule, the death of a partner is cause for the dissolution of the partnership, except where there is express agreement to the contrary. See Article 1595 of the Puerto Rico Civil Code, (Puerto Rico Laws Ann. tit. 31, § 4395 (1993)).

In *Asociación de Propietarios v. Santa Bárbara Co., supra,* at 58, the Supreme Court of Puerto Rico, interpreting Article 1589 of the Civil Code, (Puerto Rico Laws Ann. tit. 31, § 4372), specifically held that partners in a professional partnership organized under the Civil Code answer subsidiarily and jointly with their personal assets for all responsibilities of the partnership, when the patrimony of the partnership is not sufficient. Petitioner erroneously argues that this is "limited" liability, because the partners respond "only" if the partnership does not have enough assets. The fact remains, however, that partners in Puerto Rico remain personally responsible for Firm's liability. Thus, the existence of a partnership does not exempt the partners from liability in their personal capacities. In reaching this conclusion, the Supreme Court of Puerto Rico adopted the theory that the legal entity born as a result of a partnership contract is not totally independent from the partners who constitute it, citing with approval the Spanish Civil Law commentator Manresa:

> A validly executed partnership contract produces, as a first effect, the creation of an artificial entity distinct and independent from that of each one of the partners that may deal with laws actively and passively, but the birth of said entity does not extinguish the personality

> of the partners or the legal nexus originating in their contractual relations, either with the partnership formed by them or with third persons alien to it. 11 Manresa, *Código Civil Español*, 442 (1972). *Id.*, at 58.

Furthermore, the Supreme Court of Puerto Rico has emphasized that public policy bars professionals subject to state licensing from avoiding personal liability by adopting a corporate form. *Asociación de Propietarios*, at 58-59.

In attempting to distance the Puerto Rico partnerships from their counterparts in the rest of the United States, Petitioner insists on the early common law definition of partnerships. The fact is that, as recognized in *Wheeler*, for many purposes, evolving law now classifies partnerships in the United States as separate entities rather than as an aggregate of partners; thus, partners, depending on their individual characteristics, may be classified as employees of any partnership entity. *Wheeler,* 825 F.2d, at 268.

The similarity between the Uniform Partnership Act and the Puerto Rico Partnership Laws is remarkable up to and including the evolving theory of partnerships under the common law, the entity v. the aggregate theory. (Zolman Cavitch, *Business Organizations*, Mathew Bender, §11.02[2], (Supp. 1996))

In fact, this is exactly the same dichotomy expressed by the Supreme Court of Puerto Rico in analyzing the dual role of partnerships as juridical entities, and the personal responsibility of the individual partners. *Buscaglia v. Tribunal de Contribuciones*, 65 D.P.R. 241 (1945); *Asociación de Propietarios, supra.*

Both in the Uniform Partnership Act and the interpretations by the Supreme Court of Puerto Rico of the Civil Code provisions regulating partnerships, the resulting

figure is a compromise. The partnership is an association of two or more persons to carry on a business for profit, and while the entity is recognized as separate for such purposes as to hold real property, sue and be sued, it is not totally separate and distinct from its members. (Zolman Cavitch, op. cit., at § 11.02[2].)

Moreover, Petitioner's reliance on the Second Circuit cases finding significant the choice of firm organization, is likewise misplaced. Just as in *Hyland* and *E.E.O.C. v. Johnson & Higgings*, defendants argued that the professional corporations were *de facto* partnerships, to bar coverage to plaintiffs, in the present case, Petitioner argues for a finding of a *de facto* corporation to obtain the coveted protection.

The fact is that, until recently, attorneys and other professionals were barred from adopting any type of business organization other than a partnership established under the Civil Code, most particularly, those based on the limited liability of its proprietors. In other words, attorneys had no choice, if they wanted to practice in a group, but to operate under a partnership. The juridical figure of the professional corporation was not available in Puerto Rico until the enactment of the General Corporation Law, No. 144 of August 10, 1995 and the Limited Liability Partnership authorized by Act 154 of August 20, 1996, both significantly after the dissolution of the Firm in April 1992.

Chapter XIII of the General Corporation Law of 1995 provides for the incorporation of a person or group of individuals for the purpose of practicing those professions requiring a professional license or other legal authorization which, before the enactment of the law, could not be provided by a corporation. In a professional services corporation, like in a regular corporation, a stockholder generally is not personally liable for the corporation's debts, liabilities or

other obligations. That is a far cry from the personal liability of the partners under the Civil Code, who respond with their personal assets beyond the assets of the partnership.

All provisions for the operation of a domestic corporation in the General Corporation Law of Puerto Rico were made applicable to a professional services corporation, except those which are in conflict with the provisions contained in Chapter XVIII (Professional Corporations). As to the management of the professional services corporation under Puerto Rico Law, stockholders are in an identical situation to those in the federal cases cited. They are not necessarily in control of its operations except in such cases where they are also directors or officers.

The enactment of Act 154 of August 20, 1996 by the Puerto Rico Legislature, overcame the limitation imposed by the Supreme Court in the previously discussed *Asociación de Propietarios, supra,* by allowing the establishment of partnerships, specifically professional partnerships, in which as a general rule each partner's personal assets are shielded from the partnership's liabilities. (See art. 8) These new laws are discussed only for comparison purposes, inasmuch as neither law is applicable to the firm which was dissolved on April 30, 1992, and is still in the process of liquidation.[6]

To summarize, nothing in the partnership law requires that a proprietary partner be treated as an employee. Partnerships are defined by the commitment of the partners to bind themselves to contribute money, property or industry to a common fund, with the intention of dividing the profits among

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[6] Petitioner contends that the liquidation process has been completed. She failed, however, to present any evidence to support said contention which remains merely unsubstantiated argument.

themselves. How they are compensated is, without more, insufficient to support a finding of employee status.

Moreover, where, as here, the proprietary partners received the profits of the firm in term of bonuses calculated by assigned unit distributions on a regular basis, all the proprietary partners of the firm, including Petitioner, were, and are, responsible under Puerto Rico Law for the liabilities of the firm, beyond the capitalization by partners. Clearly, nothing in the law and cases discussed above indicates any requirement by Puerto Rico Law that proprietary partners be treated as employees.

B. The determinations of the Supreme Court of Puerto Rico as to tax assessments against partnerships are immaterial to a determination of the labor status of a proprietary partner.

Petitioner insists on the applicability of tax laws as a source of regulation of partner's relations among themselves. *Buscaglia, supra,* at 340, cited by Petitioner in support of her contention that partners must be treated as employees of their law firms, is simply an analysis of the applicability of Puerto Rico Tax Law to partnerships.

While the Supreme Court of Puerto Rico initially determined that under the income tax law a professional partnership integrated by attorneys had to pay taxes on the profits of the partnership separate from the taxes to be paid by the proprietary partners on the profits distributed to them by the partnership for services rendered, (*Buscaglia v. Tribunal de Contribuciones,* 65 P.R.R. 9 (1945)), the Court reconsidered the double taxation issue raised by the taxpayers in *Buscaglia I, supra*, and noted that section 32(a)(1) of the income tax law establishes that in computing the net income of the corporation or society subject to assessment by section

28, the taxpayer shall be permitted the deduction of a reasonable amount for salaries or other compensation for personal services actually rendered by its members. *Buscaglia, supra,* at 341. The term "services rendered" does not necessarily refer to services rendered as an employee, but rather, would include professional services rendered by any person, regardless of whether the services in question were rendered by an independent contractor, a proprietary partner, or an employee without capital interest in the partnership.

The Supreme Court of Puerto Rico has expressly rejected Petitioner's position that *Buscaglia* and its progeny establish the status of law firm partners for all purposes. The Treasury Department was merely interested in collecting the taxes to be assessed pursuant to the laws of the Commonwealth, including those over the "salaries" assigned by law firm partners to themselves. In *Descartes, Treas. v. Tax Court; Dávila, Int.*, 79 P.R.R. 818, 827 (1957), the Supreme Court stated:

> It is not a function of the tax law to lay down legal rules for determining the validity of the entities which it subjects to taxation; that is a function of civil, mercantile, or corporation law. But the tax law does recognize and classify pursuant to its own rules, in the practical sphere in which it evolves, the existence of those entities as taxable creatures.
>
> Independently of the requirements or limitations that the civil or mercantile law might impose on an association of two or more persons in order that it may attain the juridical personality of a partnership (sociedad) or company, the tax law, in its function of realities, furnishes the necessary solution by attacking the problem with objective criteria: whether or not it is an entity whose legal existence conforms to the formalities of the civil or mercantile law, the special

statute imposes on it the burden of its tax liability in conformity with its own classification.

The Court in *Descartes* makes it absolutely clear that the tax laws of the jurisdiction are intended to exact revenues from different persons, including partnerships, but it applies revenue rules for tax purposes only.

C. The Labor Laws Of Puerto Rico Specifically Exempt Proprietary Partners From Coverage

The only relevant laws to interpret whether an individual is an employee or an employer are the federal labor laws applicable in Puerto Rico and the labor laws of the Commonwealth of Puerto Rico. Both expressly exempt partners from their coverage. Contrary to Petitioner's contention, several of the Commonwealth's labor laws expressly exclude partners from its definitions of covered employees.

Partners are specifically excluded from coverage of the Disability Benefits Act (SINOT) (See Puerto Rico Laws Ann. tit. 11, § 202) and The Employment Security Act (Puerto Rico Laws Ann. tit. 29, § 702 (1995)). Both use identical language to exclude employment services rendered by a *partner for the partnership of which he is a party*. (Emphasis supplied.)

While the Workmen's Accident Compensation Act does not specifically exclude proprietary partners, it expressly includes industrial (non capital) partners except where the partnership to which they belong has been executed through public deed or instrument signed by notary public. (See Puerto Rico Laws Ann. tit. 11, § 2 (1978)). Undoubtedly, this silence as to capital partners while including working partners, demonstrates the legislative intent of excluding owners of the employing entity.

Moreover, in interpreting the preceding Workmen's Compensation Law, the Supreme Court held that a partner is not an employee for purpose of workmen's compensation, distinguishing the cases dealing with a corporate stockholder or officer who provides a service to a corporation. *Colón v. Com. Indem. Obreros*, 34 P.R.R. 94 (1925).

CONCLUSION

In conclusion, Petitioner's arguments do not warrant review by this Court. None of the circuits has adopted an entity approach requiring a finding of employee status. Some have relied on a common law test of employment relationship while others use an economic realities test, or a combination of both. None of the circuits however, applies a *per se* rule such as proposed by Petitioner. Petitioner has misstated the Puerto Rico Partnership Law and the applicable jurisprudence thereunder. Accordingly, the Court should deny the granting of petitioners application.

Finally, in the absence of employee status, Petitioner's ardent arguments for the obliteration of the Glass Ceiling are insufficient to warrant review of her discrimination claims by the Court.

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November 19, 1997